Recent Issues in Litigation Under the Age Discrimination in Employment Act

NORMAN B. SMITH* AND L. POE LEGGETTE**

This Article is a survey and analysis of the issues that arise in age discrimination suits in the federal courts. Its content reflects a litigator's interests: procedural questions, burdens of persuasion, problems of proof, and measures of damages. Its organization reflects a litigator's bias. We begin with an overview of the Age Discrimination in Employment Act (ADEA or the Act)[1] since it is, of course, the basis for age discrimination cases. The remaining topics are arranged roughly in the order in which a lawyer would encounter them in preparing for litigation: first, the "procedural prerequisites" to a suit; second, the demands for a jury trial and damages (since they must be made in the pleadings); and, finally, the most frequently raised issues of substance and proof encountered at trial.

I. SCOPE AND COVERAGE UNDER THE AMENDED ACT

A. *General Provisions*

The ADEA applies to "employers," a term that includes all private employers engaged in commerce who have twenty or more employees,[2] and to the states and their agencies and subdivisions.[3] It also applies to labor organizations that operate in industries affecting commerce[4] and to employment agencies.[5] The Act prohibits employment notices or

---

* Partner, Smith, Patterson, Follin, Curtis, James & Harkavy, Greensboro, N.C.; A.B. 1960, Univ. of North Carolina; LL.B. 1965, Harvard Univ.

** Assistant Director, Ohio Legal Center Institute, Columbus, Ohio; B.A. 1974, Tufts Univ.; J.D. 1977, Univ. of Va.

The authors would like to thank James L. Young and Lawrence F. Feheley for their comments on the early drafts of this Article. An earlier version of this Article appeared in the 1979 MIDWEST LABOR LAW CONF. MANUAL.

1. The Age Discrimination in Employment Act is codified in 29 U.S.C. §§ 621-634 (1976). The substantive provisions are located in § 623, the definitions in § 630, and the exceptions to unlawful practices in § 623(f). Citations in the text are to the section numbers of the Act rather than the codification.

2. 29 U.S.C. § 630(b) (1976).

3. *Id.*

4. 29 U.S.C. § 630(d) (1976). A labor organization is defined as

> a labor organization engaged in an industry affecting interstate commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint counsel so engaged which is subordinate to a national or international labor organization.

Id.

5. 29 U.S.C. § 630(c) (1976). An employment agency is defined as "any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States." *Id.*

advertisements that indicate a preference for persons of a certain age.[6] It also lists several practices in which employers, labor organizations, and employment agencies may not engage. Employers generally may not fire, refuse to hire, or treat a person unequally with respect to employment if the unfavorable decision is based on that person's age.[7] Employment agencies and labor organizations are similarly forbidden to discriminate against older workers in job referrals and membership decisions.[8]

There are two instances in which employers, labor organizations, and employment agencies may lawfully make unfavorable decisions based upon a person's age.[9] The first is when age is closely related to the requirements of a particular job—or, to use the language of the statute, when "age is a bona fide occupational qualification reasonably necessary to the normal operation of the business."[10] The second instance is when the employer or labor organization is observing the terms of a bona fide seniority system or employee plan, provided that the employer or union is not using the plan as an excuse for forcing a worker to retire or for refusing to hire an older worker.[11]

B. *Recent Changes in the Act*

Recent developments in the Congress, the Executive branch, and the courts have had a major effect on four aspects of the administration and coverage of the ADEA. These changes include (1) extension of age limits to include a greater number of people within the Act's coverage, (2) prohibition of involuntary retirement of protected workers, (3) application of the Act to state and local government employees, and (4) transfer of the responsibility for administering and enforcing the Act from the Department of Labor to the Equal Employment Opportunity Commission.

1. *Extension of Age Limits*

The ADEA originally covered employees between the ages of forty and sixty-five.[12] The 1978 amendments, effective January 1, 1979, extended the maximum age to seventy,[13] but added two exceptions for persons between sixty-five and seventy.[14] One exception covers executive or other high policy-making employees who are entitled to deferred compensation benefits of at least $27,000 annually, computed as if the plan

6. 29 U.S.C. § 623(e) (1976).

7. 29 U.S.C. § 623(a) (1976).

8. 29 U.S.C. § 623(b), (c) (1976).

9. The Act also permits disciplinary measures taken for good cause. 29 U.S.C. § 623(f)(3) (1976).

10. 29 U.S.C. § 623(f)(1) (1976).

11. 29 U.S.C. § 623(f)(2) (1976 & Supp. 1979).

12. *See* 29 U.S.C. § 631 (1976), *amended by* Pub. L. No. 95-256, § 3(a), 92 Stat. 189 (1978) (codified at 29 U.S.C. § 631 (Supp. 1979)).

13. Pub. L. No. 95-256, § 3(a), 92 Stat. 189 (1978) (codified at 29 U.S.C. § 631 (Supp. 1979)).

14. Pub. L. No. 95-256, § 3(a), 92 Stat. 189 (1978) (codified at 29 U.S.C. § 631 (Supp. 1979)).

were a straight-line annuity, without regard for employee or "roll-over" contributions.[15] The other exception covers college and university personnel with unlimited tenure contracts.[16] The latter exemption expires on July 1, 1982.[17]

The original sections dealing with discrimination in federal government employment did not contain age limits,[18] and the courts were divided on whether the limits found in other sections of the Act applied to federal employees.[19] Although the 1978 amendments to these sections established a minimum age of forty,[20] they did not contain a maximum age provision. As a result, it seems clear that the Act now covers all federal employees over the age of forty.

While the revised age limits did not become effective until January 1, 1979,[21] at least one district court has used an equal protection analysis to extend the seventy-year-old age limit to an employee whose job was threatened after the passage of the amendments but before the effective date. In *Kuhar v. Greensburg-Salem School District*[22] the court ruled that an employer's attempt to force the retirement of a sixty-five-year-old employee during the interium period placed the employee in a classification different from other employees, and proceeded to compare the employee's plight with that of persons retiring after the effective date of the amendments.[23] The court concluded that there was no rational relationship between the employee's involuntary retirement and the employer-school district's interest in educating its children, and enjoined the employer's proposed action.[24] The decision relied heavily on Congress' decision to protect workers until they reached the age of seventy (ignoring the fact that the new policy did not become effective until a date well after the employer's proposed action would have been completed),[25] and on the "unusual factual circumstances of [the] case," particularly the fact that plaintiff was to be the last employee of the district retired under the lower limit.[26] As a result of *Kuhar*, the 1978 amendments for all practical

---

15. 29 U.S.C. § 631(c) (Supp. 1979).

16. 29 U.S.C. § 631(d) (Supp. 1979).

17. Pub. L. No. 95-256, § 3(b)(3), 92 Stat. 190 (1978).

18. *See* 29 U.S.C. § 633a (1976), *amended by* Pub. L. No. 95-256, § 5(a), 92 Stat. 191 (1978) (codified at 29 U.S.C. § 633a (Supp. 1979)).

19. *Compare* Christie v. Marston, 14 Fair Empl. Prac. Cas. 759 (7th Cir. 1977) (age limits do not apply to federal employees), *with* Bevans v. Nugent, 14 Fair Empl. Prac. Cas. 279 (S.D.N.Y. 1976) (age limits apply to federal as well as private sector employees).

20. Pub. L. No. 95-256, § 5(a), 92 Stat. 192 (1978) (codified at 29 U.S.C. § 633a(a) (Supp. 1979)).

21. Pub. L. No. 95-256, § 3(b)(1), 92 Stat. 191 (1978). The portion of the 1976 Act applicable to federal government employees became effective on Sept. 30, 1978. *Id.* § 5(f), 92 Stat. 192 (1976).

22. 466 F. Supp. 806 (W.D. Pa. 1979).

23. *Id.* at 997-1000.

24. *Id.*

25. *Id.*

26. *Id.* at 1000.

purposes became effective on April 6, 1978, the date the President signed the bill.[27]

2. *The Prohibition of Involuntary Retirement*

Prior to the 1978 amendments, the ADEA contained a broad exemption for employer or union actions taken pursuant to a bona fide seniority system or employee benefit plan.[28] In *United Airlines, Inc. v. McMann*, [29] the United States Supreme Court, rejecting the plaintiff's proposal for a per se rule that would have required employers to show a business or economic purpose to justify forced early retirement of an employee, interpreted this exemption to allow the involuntary retirement of protected individuals under the terms of a plan that antedated the ADEA. Since it dealt with a pre-existing plan, however, the *McMann* case did not settle the legality of an employer's election to force the early retirement of a protected employee under a plan that granted such an option. Thus, a split developed in the lower courts over whether an employer "observed the terms" of a plan when it took such steps. One group of courts held that the permissive nature of the provision was irrelevant,[30] but a second group, unwilling to give employers a free hand in the matter, ruled that an employee had the opportunity to show that an otherwise permissible plan was being administered discriminatorily.[31] This issue was largely mooted by the 1978 amendments, and the Act now provides that the exemption for bona fide seniority systems and employee benefit plans does not allow an employer to force the early retirement of a protected worker.[32]

Nothing in the 1978 amendments deals with an employer's right to deny pension benefits for workers over sixty-five, the normal retirement age under the Employee Retirement Income Security Act,[33] but the Assistant Secretary of Labor has advised the Senate Committee on Human Resources that an employer would not violate the ADEA by failing to make pension contributions or their equivalent for an employee

---

27. *But see* Issarescu v. Cleland, 19 Fair Empl. Prac. Cas. 346, 349 (D.R.I. 1979) ("The fact that Congress has now changed its mind and abolished the mandatory retirement provision [for federal employees] does not affect the rationality and constitutionality of the previous legislative decision.").

28. *See* 29 U.S.C. § 623(f) (1976), *amended by* Pub. L. No. 95-256, § 2(a), 92 Stat. 189 (1978) (codified at 29 U.S.C. § 623(f)(2) (Supp. 1979)).

29. 434 U.S. 192 (1977).

30. *See, e.g.*, Marshall v. Baltimore & O. R.R. Co., 461 F. Supp. 362 (D. Md. 1978); Marshall v. Atlantic Container Line, 18 Fair Empl. Prac. Cas. 1167 (S.D.N.Y. 1978).

31. *See, e.g.*, Cowlishaw v. Armstrong Rubber Co., 450 F. Supp. 148 (E.D.N.Y. 1978); Hannan v. Chrysler Motor Corp., 443 F. Supp. 802 (E.D. Mich. 1978). In both cases the courts recognized that involuntary early retirement can be a proper tool of pension planning when used to weed out workers whose productivity had declined prematurely, but both courts were concerned that this tool could also be used merely to reduce payrolls when business turned sour.

32. 29 U.S.C. § 623(f)(2) (Supp. 1979) (added by Pub. L. No. 95-256, § 2(a), 92 Stat. 189 (1978)). According to the new Wage and Hour Interpretive Bulletin, 29 C.F.R. § 860.120(c) (1979), "observes the terms of a plan" means doing only what the plan requires, not what it permits.

33. *See* 29 U.S.C. § 1002(24) (Supp. 1979).

between the ages of sixty-five and seventy.[34] In addition, the Department of Labor, with the concurrence of the Equal Employment Opportunity Commission,[35] has announced new interpretive guidelines for employee benefit plans, which allow an employer to provide reduced benefits to older employees if the reduction can be justified on the basis of actual cost or reasonable actuarial data.[36] The actuarial data may be computed with respect to an entire benefit package or on a benefit-by-benefit basis,[37] and either an age range of sixty-five to sixty-nine or five single-year ranges may be used.[38] An employer cannot, however, require greater contributions by older employees as a condition of employment or participation in the plan.[39] The new regulations also set out specific guidelines for life, health, and long-term disability insurance, and retirement plans.[40]

3. *Application of the ADEA to State and Local Governments*

The ADEA applies to state and local governments as well as private employers.[41] It should also be noted that the Age Discrimination Act of 1975[42]—a completely separate piece of legislation—extends to state and local governments by prohibiting age discrimination by recipients of federal financial assistance, including revenue-sharing funds.

In *Arritt v. Grisell*[43] the Fourth Circuit Court of Appeals held that the application of the ADEA to state and local government workers does not violate the United States Constitution. This holding should be contrasted with *National League of Cities v. Usery*,[44] in which the United States Supreme Court struck down the extension of the Fair Labor Standards Act to state and municipal employees on the ground that it violated the tenth amendment. The difference in results is supported by the Fourth Circuit's conclusion that the ADEA was enacted to enforce section 5 of the fourteenth amendment, rather than the commerce clause, and that the Act's intrusion into the integral operation of state and local governments is therefore justified.[45] This result clearly seems correct in light of *Fitzpatrick v. Bitzer*,[46] which upheld the application of Title VII to state government employees against an eleventh amendment challenge.

34. 8 LAB. REL. REP. (BNA) 421:360.

35. 44 Fed. Reg. 30,648 (1979).

36. 29 C.F.R. § 860.120(a)-(d) (1979).

37. 29 C.F.R. § 860.120(d)(2) (1979).

38. 29 C.F.R. § 860.120(d)(3) (1979).

39. 29 C.F.R. § 860.120(d)(4) (1979).

40. 29 C.F.R. § 860.120(e), (f) (1979).

41. 29 U.S.C. § 630(b) (1976).

42. 42 U.S.C. §§ 6101-6107 (1976 & Supp. 1979).

43. 567 F.2d 1267 (4th Cir. 1977). The same rationale was used in Marshall v. Delaware River & Bay Authority, 19 Fair Empl. Prac. Cas. 1229 (D. Del. 1979), to apply the ADEA to an interstate authority.

44. 426 U.S. 833 (1976).

45. 567 F.2d at 1269-71.

46. 427 U.S. 445 (1976) (decided the same term as, but subsequent to, *Usery*). *See also* Note, *The Constitutionality of the ADEA After* Usery, 30 ARK. L. REV. 363 (1976).

4. *Administration of the Act*

Prior to July 1, 1979, the ADEA was administered by the Wage and Hour Division of the Department of Labor. In 1978 Reorganization Plan No. 1, section 2, the President transferred the responsibility for administration and enforcement of the Act from the Secretary of Labor to the Equal Employment Opportunity Commission, effective July 1, 1979.[47]

II. TIME LIMITS AND OTHER PROCEDURAL PREREQUISITES

The ADEA expressly grants older workers the right to bring a private suit but requires that they first satisfy certain procedural requirements designed to give state and federal agencies an opportunity to resolve the dispute through conciliation.[48] The procedures vary, depending upon whether the potential plaintiff's state has an age discrimination law that allows a state agency to grant or seek relief for discriminatory practices. If a state agency does not have such authority, the plaintiff must file a charge of age discrimination with the EEOC within 180 days "after the alleged unlawful practice occurred,"[49] and then wait at least 60 days before filing a lawsuit in order to give the Commission a chance to remedy the practice by "informal methods of conciliation, conference, and persuasion."[50]

The federal procedure is more complicated if a state agency has the authority to pursue relief on the plaintiff's behalf. In that case, the plaintiff must generally take his claim to the state agency before filing a charge with the EEOC.[51] The plaintiff must then file a charge with the federal agency within 30 days after he is notified that the state proceedings have ended,[52] but in no case later than 300 days after the alleged discriminatory practice occurred.[53] The plaintiff must again wait to give the state and federal agencies a chance to settle the dispute before commencing a private suit: sixty days after filing the federal charge[54] and up to sixty days after filing the state charge, unless the state proceedings end sooner.[55] These requirements have had a major impact on litigation under the Act; twenty-one percent of all reported cases have been lost because the employee failed to abide by the procedural prerequisites or time limits.[56]

A. *Filing the Federal Charge*

1. *Content of the Communication*

As originally written, the Act required the employee to file a notice

47. 43 Fed. Reg. 19,807 (1978).
48. 29 U.S.C. § 626(c)-(e) (1976 & Supp. 1979).
49. 29 U.S.C. § 626(d)(1) (Supp. 1979).
50. 29 U.S.C. § 626(d) (1976 & Supp. 1979).
51. 29 U.S.C. § 633(b) (1976).
52. 29 U.S.C. § 626(d)(2) (1976 & Supp. 1979).
53. 29 U.S.C. § 626(d) (1976 & Supp. 1979).
54. *Id.*
55. 29 U.S.C. § 633(b) (1976).
56. Reed, *The First Ten Years of the ADEA*, 4 OHIO N.L. REV. 748, 759 (1977).

with the Secretary of Labor, setting out his intention to bring a civil action in federal district court within 180 days of the occurrence of the unlawful practice.[57] Under this provision, a number of courts held that papers which simply complained of age discrimination did not constitute notice of intent to file a lawsuit.[58] The Fifth Circuit even went so far as to hold that a letter to the Department of Labor complaining of discriminatory practices and asking the Department to bring a suit was insufficient; the claimant had to say explicitly that he intended to bring suit himself.[59] On the other hand, some courts held that providing the Secretary of Labor with information about the claim was the functional equivalent of a notice of intent to sue.[60]

Congress clearly intended to lay these problems to rest with the passage of the 1978 amendments. For civil actions filed after April 6, 1978, plaintiffs need no longer show that they filed a notice of intent to sue. Instead, they are required to show only that they filed a charge alleging discrimination.[61] However, one issue remains unsettled: the necessary degree of specificity concerning the alleged unlawful conduct. At least one court has imposed a strict standard, holding that the notice must set out each allegedly unlawful act, and dismissing a private suit challenging discriminatory conditions of employment and a retaliatory discharge when the employee's notice had mentioned only a discriminatory discharge.[62]

2. *Form of the Communication*

Both the original and amended versions of the ADEA specify that the employee's communication must be "filed" with the responsible federal agency.[63] The courts have split on whether the term "filed" requires a written communication, or whether a telephone call will suffice.[64] The Conference Committee Report that accompanied the 1978 amendments

---

57. *See* 29 U.S.C. § 626(d) (1976), *amended by* Pub. L. No. 95-256, § 4(b), 92 Stat. 190 (1978) (codified at 29 U.S.C. § 626(d) (Supp. 1979)).

58. Charlier v. S.C. Johnson & Son, Inc., 556 F.2d 761 (5th Cir. 1977); Hiscott v. General Elec. Co., 521 F.2d 632 (6th Cir. 1975); Davis v. RJR Foods, Inc., 420 F. Supp. 930 (S.D.N.Y.), *aff'd*, 556 F.2d 535 (2d Cir. 1976).

59. Powell v. Southwestern Bell Tel. Co., 494 F.2d 485 (5th Cir. 1974). *See also* Tanner v. GCC Beverages, Inc., 18 Fair Empl. Prac. Cas. 489 (N.D. Fla. 1978) (letter stating that plaintiff had filed suit held to be insufficient).

60. Cowlishaw v. Armstrong Rubber Co., 425 F. Supp. 802 (E.D.N.Y. 1977); Smith v. Joseph Schlitz Brewing Co., 419 F. Supp. 770 (D.N.J. 1976), *rev'd on other grounds*, 584 F.2d 1231 (3d Cir. 1978); Sutherland v. SKF Industries, Inc., 419 F. Supp. 610 (E.D. Pa. 1976).

61. 29 U.S.C. § 626(d) (Supp. 1979) (added by Pub. L. No. 95-256, § 4(b), 92 Stat. 190 (1978)). There is no substitute for filing a charge; it is a jurisdictional prerequisite. Bengochea v. Norcross, Inc., 464 F. Supp. 709 (E.D. Pa. 1979).

62. Looney v. Commercial Union Assurance Co., 428 F. Supp. 533 (E.D. Mich. 1977).

63. *See* 29 U.S.C. § 626(d) (1976 & Supp. 1979).

64. *Compare* Reich v. Dow Badische Co., 575 F.2d 363 (2d Cir.), *cert. denied*, 439 U.S. 1006 (1978); Hays v. Republic Steel Corp., 531 F.2d 1307 (5th Cir. 1976); Enos v. Kaiser Indus. Corp., 443 F. Supp. 798 (D.D.C. 1978); *and* Hughes v. Beaunit Corp., 12 Fair Empl. Prac. Cas. 1564 (E.D. Tenn. 1976) (all holding that oral notice is insufficient), *with* Noto v. JFD Elec. Corp., 446 F. Supp. 92 (E.D.N.C. 1978); *and* Woodford v. Kinney Shoe Corp., 369 F. Supp. 911 (N.D. Ga. 1973) (both holding that oral notice is acceptable).

noted, however, that the charge must be in writing,[65] and this comment is likely to carry a great deal of weight in future cases.

3. *Is the Filing Period Jurisdictional?*

Prior to the 1978 amendments, it was unclear whether the 180-day filing period was or was not jurisdictional, with the courts taking one of three positions on the question. One group of courts seemed to hold that filing within the time limit was a jurisdictional prerequisite to the commencement of an action.[66] A second group agreed that the time limit was jurisdictional, but indicated that in extreme situations a suit might be permitted even though a claim was not filed within the 180-day period.[67] A third group of courts, led by the Tenth Circuit Court of Appeals, held that the filing period was akin to a statute of limitations, which could be tolled under some circumstances.[68] The Supreme Court granted certiorari[69] in *Dartt v. Shell Oil Co.*,[70] a Tenth Circuit case decided along the lines of the last position, but the lower court's decision was affirmed by an equally divided Court,[71] leaving no clear answer to the question.

The cases that allow tolling of the time period seem to be the better reasoned. In *Burnett v. New York Central Railroad*[72] the Supreme Court rejected a mechanical approach for determining whether a time limit is subject to equitable modification, opting instead for a search for congressional intent. Although there is little to be gained from the legislative history of the ADEA, cases that follow a strict jurisdictional position seem to construe the purpose of the 180-day time limit too restrictively. These cases[73] correctly identify the purposes that the time limit is designed to serve—namely, providing the agency an opportunity to settle the dispute administratively while the complaint is still fresh, and the employer a chance to collect the necessary papers and other evidence[74]—but fail to recognize that an unbending interpretation of the time period is

---

65. [1978] U.S. CODE CONG. & AD. NEWS 1006.

66. Hiscott v. General Elec. Co., 521 F.2d 632 (6th Cir. 1975); Law v. United Airlines Co., 519 F.2d 170 (10th Cir. 1975); Vaughn v. Chrysler Corp., 382 F. Supp. 143 (E.D. Mich. 1974); Oshiro v. Pan Am. World Airways, Inc., 378 F. Supp. 80 (D. Haw. 1974); Gebhard v. GAF Corp., 59 F.R.D. 504 (D.D.C. 1973); Burgett v. Cudhay Co., 361 F. Supp. 617 (D. Kan. 1973).

67. Reich v. Dow Badische Co., 575 F.2d 363 (2d Cir.), *cert. denied*, 439 U.S. 1006 (1978); Hays v. Republic Steel Corp., 531 F.2d 1307 (5th Cir. 1976); Hughes v. Beaunit Corp., 12 Fair Empl. Prac. Cas. 1564 (E.D. Tenn. 1976); Enos v. Kaiser Indus. Corp., 443 F. Supp. 798 (D.D.C. 1978). To the contrary, holding oral notice to be acceptable are: Noto v. JFD Elec. Corp., 446 F. Supp. 92 (E.D.N.C. 1978); Woodford v. Kinney Shoe Corp., 369 F. Supp. 911 (N.D. Ga. 1973).

68. *See* Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976), *aff'd by an equally divided court*, 434 U.S. 99 (1977). *See also* Bonham v. Dresser Indus., 569 F.2d 187 (3d Cir. 1977); Skoglund v. Singer Co., 403 F. Supp. 797 (D.N.H. 1975); Bishop v. Jelleff Assoc., 398 F. Supp. 579 (D.D.C. 1974).

69. 429 U.S. 1089 (1977).

70. 539 F.2d 1256 (10th Cir. 1976), *aff'd by an equally divided court*, 434 U.S. 99 (1977).

71. 434 U.S. 99 (1977).

72. 380 U.S. 424 (1965).

73. *See* note 66 *supra*.

74. *Id.*

not necessary to these goals. The cases[75] that permit tolling, by comparison, acknowledge that the purposes of the filing period limitation can be accomplished even though the charge is filed more than 180 days afterwards, as long as the evidence is still fresh.

The Conference Committee Report accompanying the 1978 amendments took the position that the 180-day period is not jurisdictional.[76] Since the 1978 amendments changed the basic structure of the complaint process, substituting the filing of a "charge" for the "notice of intent to sue,"[77] and since this change was a compromise by those who favored total elimination of the time limit,[78] the Conference Committee's comments should be given a great deal of deference by the courts.

The early cases that permit tolling are still useful in determining when the 180-day period should be tolled.[79] The factors to be considered, as outlined in *Abbott v. Moore Business Forms, Inc.*,[80] include (1) whether the employee had actual or constructive notice of the procedural requirements, (2) the employee's diligence once the remedies were made known to him, (3) whether the employer has been prejudiced by the delay, and (4) whether there were any misleading communications from the federal agency. Some courts have also held that the filing period is tolled when the employer fails to comply with the statutory requirement that notices outlining employee rights be posted at the place of business.[81] Compliance with the notice posting requirement, however, will not necessarily protect the employer; the notice must also refer to the 180-day period.[82]

4. *Beginning and End of the Period*

There is some question concerning when the 180-day period begins to run in discharge cases. The majority of reported cases hold that the period begins on the last day that the employee performed services for the employer, even though he may have received compensation or other benefits after that date.[83] The three reasons most frequently given to

75. *See* note 68 *supra*.

76. [1978] U.S. CODE CONG. & AD. NEWS 534.

77. Pub. L. No. 95-256, § 4(b), 92 Stat. 190 (1978).

78. 46 U.S.L.W. 56 (May 9, 1978).

79. *See* notes 66-68 *supra*.

80. 439 F. Supp. 643 (D.N.H. 1973).

81. Charlier v. S.C. Johnson & Son, Inc., 556 F.2d 761 (5th Cir. 1977); Bishop v. Jelleff Assoc., 398 F. Supp. 579 (D.D.C. 1974). Posting of notices outlining employees' rights is required by 29 U.S.C. § 627 (1976).

The statute of limitations will not be tolled for an employee who is responsible for posting the notice. Adams v. Federal Signal Corp., 559 F.2d 433 (5th Cir. 1977); Malinowski v. State Farm Insur. Co., 18 Fair Empl. Prac. Cas. 693 (W.D. Pa. 1978).

82. Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976), *aff'd by an equally divided court*, 434 U.S. 99 (1977).

83. Bonham v. Dresser Indus., 569 F.2d 187 (3d Cir. 1977); Parrish v. Schlumberger Ltd., 19 Fair Empl. Prac. Cas. 717 (S.D. Tex. 1979); Jackson v. Alcan Sheet & Plate Co., 462 F. Supp. 82 (N.D.N.Y. 1978); Thomas v. Blue Cross-Blue Shield, 449 F. Supp. 1021 (M.D.N.C. 1978); Noto v. JFD

support the date-of-discharge test are that it is the date on which the employee has reason to know that he is the victim of discrimination, that it assures that the federal enforcement agency will be able to investigate the charge while it is still fresh, and that it avoids penalizing employers who have liberal benefit plans that may extend over an extended period of time.[84] Some cases, however, hold that the period does not begin to run until the date of administrative termination, the postponed termination date elected for purposes of a pension benefit plan, or the date on which the last payment of severance pay is received.[85] The uncertainty created by these decisions is mitigated somewhat by *Anisgard v. Exxon Corp.*,[86] which holds that a notice or charge is valid even though it is filed before the effective date of the employee's discharge. Employees can therefore protect themselves by filing when they are discharged.

The courts are also divided on whether a continuing practice of discrimination—for example, a discharge followed by a refusal to rehire or a demotion followed by a failure to promote—tolls the 180-day filing period with respect to the first discriminatory act.[87]

5. *Applicability of the Charge and Time Limit Provisions*

The filing requirements of the ADEA can be a key provision in determining who can be joined in a lawsuit. An aggrieved employee who fails to file an administrative charge within the time limits specified by the Act may not be permitted to join in an action against the discriminating employer. Similarly, a potential defendant who is not named in the charge might not be subject to suit.

In *Quinn v. Bowmar Publishing Co.*[88] the court held that an employee could not sue individual corporate officers when he had named only the corporate employer as the prospective defendant. On the other hand, in *Geller v. Markham*[89] the court applied a more flexible rule and allowed the employee to sue four school officials not specifically named in the notice. Applying a two-part test, the court ruled that dismissal was not required since the purpose of the notice requirement had been fulfilled: first, the notice had described the facts with sufficient clarity to lead the Department

---

Electronics Corp., 446 F. Supp. 92 (E.D.N.C. 1978); Johnston v. Aerojet General Corp., 18 Fair Empl. Prac. Cas. 1107 (E.D. Cal. 1978); Aronsen v. Crown Zellerbach Corp., 18 Fair Empl. Prac. Cas. 1107 (E.D. Cal. 1978); Davis v. RJR Foods, Inc., 420 F. Supp. 930 (S.D.N.Y. 1976).

84. *See generally* cases cited in note 83 *supra*.

85. Moses v. Falstaff Brewing Corp., 525 F.2d 92 (8th Cir. 1975); Marshall v. Kimberly-Clark Corp., 15 Fair Empl. Prac. Cas. 690 (N.D. Ga. 1977); Mistretta v. Sandia Corp., 12 Fair Empl. Prac. Cas. 1225 (D.N.M. 1975).

86. 409 F. Supp. 212 (E.D. La. 1975).

87. *Compare* Thomas v. DuPont Co., 574 F.2d 1324 (5th Cir. 1978); Mistretta v. Sandia Corp., 15 Fair Empl. Prac. Cas. 690 (D.N.M. 1977); Stanley v. General Motors Co., 71 F.R.D. 99 (S.D. Wis. 1976); McGinley v. Burroughs Corp., 407 F. Supp. 903 (E.D. Pa. 1975).

88. 445 F. Supp. 780 (D. Md. 1978).

89. 19 Fair Empl. Prac. Cas. 1619 (D. Conn. 1979).

of Labor to the four officials and the Department's investigation, therefore, had not been hampered;[90] second, the defendants had not been prejudiced by the employee's failure to name them in the notice since they had been represented by the school board's attorney and had virtually identical interests in the litigation.[91]

As for joining other plaintiffs, it is now well established that a class action under rule 23 of the Federal Rules of Civil Procedure is not permitted under the ADEA.[92] Employees may join in an action, however, by filing a statement of consent in the court in which the action is pending.[93] The cases are split on whether each plaintiff must have filed a notice, or whether it is enough that the original plaintiff had done so.[94]

B. *The Sixty Day Waiting Period*

The charge must be filed not less than sixty days prior to commencing a suit in federal district court.[95] It is generally agreed that the sixty-day waiting period is jurisdictional, and the case must be dismissed if the complaint is filed less than sixty days after the charge was submitted.[96] Because of the delays attendant in federal litigation, a dismissal can be dangerous to the employee-plaintiff. Although a dismissal is without prejudice,[97] it might come after the statute of limitations had run, meaning that a new suit would be time-barred.

Two reported cases have permitted an employee to bring suit even though the sixty-day period had not yet elapsed at the time the suit was commenced. In one case[98] the court held that an employee need not wait sixty days before filing suit when the Secretary of Labor informs him that it will not be possible to resolve his charge administratively. The other case[99] was based upon a peculiar set of circumstances. The employee first filed a

---

90. *Id.* at 1621.

91. *Id.* at 1621-22.

92. LaChapelle v. Owens-Illinois, 513 F.2d 286 (5th Cir. 1975).

93. 29 U.S.C. § 216 (1976).

94. Holding that notice is not required: Geller v. Markham, 19 Fair Empl. Prac. Cas. 1622 (D. Conn. 1979); Catlett v. Owens-Illinois, Inc., 454 F. Supp. 358 (W.D. Mo. 1978); Cavanaugh v. Texas Instruments, Inc., 440 F. Supp. 1124 (S.D. Tex. 1977); Locascio v. Teletype Corp., 74 F.R.D. 108 (N.D. Ill. 1977); Pandis v. Sikorsky Aircraft Division, 431 F. Supp. 793 (D. Conn. 1977) (limits class only to those who could have filed timely notice to sue on that date the original plaintiff sent his notice); Mistretta v. Sandia Corp., 12 Fair Empl. Prac. Cas. 1225 (D.N.M. 1975); Burgett v. Cudahy Co., 361 F. Supp. 617 (D. Kan. 1973). Cases to the contrary, holding that notice must have been given by each class member, are: Travers v. Corning Glass Works, 76 F.R.D. 431 (S.D.N.Y. 1977); McCorstin v. United States Steel Corp., 11 Fair Empl. Prac. Cas. 1478 (N.D. Ala. 1974); Oshiro v. Pan Am. World Airways, 378 F. Supp. 80 (D. Haw. 1974); Price v. Maryland Cas. Co., 62 F.R.D. 614 (S.D. Miss. 1972).

95. 29 U.S.C. § 626(d) (1976 & Supp. 1979).

96. Rucker v. Great Scott Super Markets, 528 F.2d 393 (6th Cir. 1976); Hiscott v. General Elec. Co., 521 F.2d 632 (6th Cir. 1975); Hannon v. Continental Nat'l Bank, 427 F. Supp. 215 (D. Colo. 1977).

97. *See, e.g.*, Miller v. Saxbe, 10 Fair Empl. Prac. Cas. 468 (D.D.C. 1975) (Title VII case).

98. Nickel v. Shatterproof Glass Corp., 424 F. Supp. 884 (E.D. Mich. 1976), *aff'd*, 599 F.2d 1055 (6th Cir. 1979).

99. Seider v. Canada Dry Corp., 18 Fair Empl. Prac. Cas. 1787 (S.D.N.Y. 1978).

charge against the employer, a corporate subsidiary, then, fifty-two days later, followed it with a second charge against the parent company.[100] Fifty-seven days later, he filed a private action against both companies.[101] The court refused to dismiss the complaint against the parent, finding that the Secretary of Labor had been given ample time to pursue conciliatory remedies, and that the plaintiff could have skirted the time limit in any event by amending his complaint four days after it was filed.[102] Since the purpose of the sixty-day time limit is to give the agency a chance to resolve the charge, the result in both cases seems correct.[103]

C. *State Remedies*

A state which has its own law prohibiting age discrimination *and* an agency empowered to grant or seek relief for discriminatory practices is commonly referred to as a deferral state since the time for filing a charge with the EEOC is extended. Under current practice, the charge must be filed within 300 days after the occurence of the allegedly discriminatory act or within 30 days of the receipt of a notice that the state proceedings have ended, whichever is earlier.[104] In addition, no private lawsuit can be commenced within sixty days after the charge is filed with the state agency, unless the state proceedings end sooner.[105]

The greatest dispute in this area, only recently resolved by the Supreme Court, was whether a plaintiff must first resort to state remedies before filing a complaint in federal court. Some lower courts had held that resort to the state agency (when available) was a jurisdictional prerequisite to suit in the federal courts;[106] but others, although referring to the requirement as jurisdictional, excused the plaintiff's failure to seek state relief.[107] Moreover, in *Holliday v. Ketchum, MacLeod & Grove, Inc.*,[108] the Third Circuit Court of Appeals, relying on a comment in the Senate

---

100. *Id.* at 1788.

101. *Id.*

102. *Id.* at 1788-89.

103. Note, *Procedural Prerequisites to Private Suit Under the Age Discrimination in Employment Act*, 44 U. CHI. L. REV. 457, 463 (1977).

104. 28 U.S.C. § 626(d)(2) (Supp. 1979).

105. 28 U.S.C. § 633(b) (1976).

106. Curry v. Continental Airlines, 513 F.2d 691 (9th Cir. 1975); Hadfield v. Mitre Corp., 459 F. Supp. 829 (D. Mass. 1978) (following Love v. Pullman, 404 U.S. 522 (1972)); Enos v. Kaiser Indus. Corp., 443 F. Supp. 798 (D.D.C. 1978) (collecting cases); Bertsch v. Ford Motor Co., 415 F. Supp. 619 (E.D. Mich. 1976); Graham v. Chrysler Corp., 15 Fair Empl. Prac. Cas. 876 (E.D. Mich. 1976); Berry v. Crocker Nat'l Bank, 13 Fair Empl. Prac. Cas. 673 (N.D. Cal. 1976); Anisgard v. Exxon Corp., 409 F. Supp. 212 (E.D. La. 1975); Raynor v. Great Atl. & Pac. Tea Co., 400 F. Supp. 357 (E.D. Va. 1975); Garces v. Sagner Int'l, Inc., 12 Fair Empl. Prac. Cas. 569 (D.P.R. 1974).

107. Reich v. Dow Badische Co., 575 F.2d 363 (2d Cir.), *cert. denied*, 439 U.S. 1006 (1978); Taylor v. Sierra Club, 18 Fair Empl. Prac. Cas. 1349 (N.D. Cal. 1978); Arnold v. Hawaiian Tel. Co., 12 Fair Empl. Prac. Cas. 400 (D. Haw. 1975).

108. 17 Fair Empl. Prac. Cas. 1075 (W.D. Pa. 1977). *See also* Gabriele v. Chrysler Corp., 573 F.2d 949 (6th Cir. 1978); Evans v. Oscar Mayer & Co., 17 Fair Empl. Prac. Cas. 1119 (8th Cir. 1978), *rev'd on other grounds*, 441 U.S. 750 (1979); Cubbedge v. National Geographic Soc'y, 449 F. Supp. 553 (D.D.C. 1978); Bertrand v. Orkin Exterminating Co., 419 F. Supp. 1123 (N.D. Ill. 1976).

Human Resources Committee's 1978 report that states that employees could elect whether to seek state relief, held that the resort to state relief is entirely optional and in no way affects the right to bring a private action in federal court.

The reasons given for requiring recourse to an available state remedy were much the same as those given to support the decisions that held that the federal filing requirement is jurisdictional.[109] On the other hand, at least three arguments were made in support of the opposite result. It has been pointed out that the prior recourse requirement is meaningless since the statute clearly allows an action to be commenced in federal court prior to the completion of the state proceedings.[110] Others have pointed out that the addition of a further jurisdictional prerequisite only serves to frustrate the remedial purpose of the Act and impede its enforcement. Finally, some authorities have noted that the decisions requiring resort to state proceedings under Title VII, for example, *Love v. Pullman Co.*,[111] are not applicable to the ADEA since state and federal investigations can proceed at the same time under the ADEA but not Title VII.[112]

Fortunately, many of the problems caused by the prior recourse question were resolved in the Supreme Court's decision in *Oscar Mayer & Co. v. Evans*.[113] The case answered two important questions. First, the Court held that an employee must resort to the administrative remedies provided by a deferral state before initiating a suit in federal court under the Act.[114] In reaching this result the Court observed that the language found in the ADEA is nearly identical to the comparable provision of Title VII.[115] On this basis, it concluded that Congress must have intended the construction of the Act to follow that of Title VII.[116] The Court then turned to a second, lesser procedural question, holding that state time limits governing the filing of a charge of age discrimination do not affect whether an employee may bring an action in federal court.[117] The Court noted that section 14(b) of the Act[118] merely requires that a potential

109. *See* Note, *Procedural Prerequisites to Private Suit Under the Age Discrimination in Employment Act*, 44 U. CHI. L. REV. 457, 475-79 (1977) (summarizing both sides of the argument).

110. Section 633(b) provides only that "no suit may be brought . . . before the expiration of sixty days after proceedings *have been commenced* under the state law (emphasis added)."

111. 404 U.S. 522 (1972).

112. The arguments for and against making state proceedings jurisdictional are summarized in Note, *Procedural Prerequisites to Private Suit Under the Age Discrimination in Employment Act*, 44 U. CHI. L. REV. 457, 475-79 (1977).

113. 441 U.S. 750 (1979). The Third Circuit has recently ruled that *Evans* does not require the federal enforcement agency to resort to state proceedings before filing a suit since the agency's power to sue is derived from the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976 & Supp. 1979), which does not require resort to state proceedings. Marshall v. Chamberlain Mfg. Co., 601 F.2d 100 (3d Cir. 1979).

114. *Id.* at 758.

115. *Id.* at 756.

116. *Id.*

117. *Id.* at 758-65.

118. 28 U.S.C. § 633(b) (1976).

plaintiff "commence" a state proceeding more than sixty days before filing suit,[119] and proceedings are commenced when the employee sends a "written and signed statement of the facts" on which the charge is based to the state agency by registered mail.[120] The Court rejected the employer's argument that the employee's failure to file within the state's 120-day statute of limitations barred the action in federal court,[121] and ordered that the action be held in abeyance pending plaintiff's compliance with the necessary state prerequisites.[122]

Of course, the deferral section of the Act still presents traps for the unwary practitioner. One question that arises from time-to-time is whether a particular state's laws give a state agency the power to grant or seek relief, the triggering event under section 14(b).[123] The courts have held that the laws of Illinois, Ohio, and North Carolina do not meet the requirements of section 14(b),[124] while the laws of Kentucky do.[125] The inherent danger is that an employee will in good faith believe that there is a state remedy which qualifies under section 14(b) and, accordingly, will place his reliance on the 300-day filing limitation that applies when a deferral state is in the picture rather than the 180-day limitation that governs nondeferral situations.[126] If the employee later turns out to be wrong in his judgment, the federal limitations period may have expired. It is important to note, however, that an employee can effectively give notice to the federal enforcement agency *before* commencing state proceedings,[127] and an employee should take no chances, filing within the 180-day limit even if there is a clear state remedy available.

D. *Statute of Limitations*

The ADEA, through section 7(e),[128] incorporates the statute of limitations found in the Portal-to-Portal Act.[129] The period is three years for willful violations of the Act and two years for other violations.[130] Thus far, the courts are in agreement that the burden is on the employer to prove the facts necessary to reduce the period from three years to two.[131]

119. 441 U.S. at 759.

120. *Id.* at 760.

121. *Id.* at 758-59.

122. *Id.* at 764-65.

123. 29 U.S.C. § 633(b) (1976).

124. Eklund v. Lubrizol Corp., 529 F.2d 247 (6th Cir. 1975); Spagnuolo v. Whirlpool Corp., 19 Fair Empl. Prac. Cas. 170 (W.D.N.C. 1979); Bertrand v. Orkin Exterminating Co., 419 F. Supp. 1123, *on recon.*, 432 F. Supp. 952 (N.D. Ill. 1976). Ohio has recently given its Civil Rights Commission the power (effective November 13, 1979) to grant relief for age discrimination violations. OHIO REV. CODE ANN. §§ 4112.01-.99 (Page 1973 Supp. 1980). Accordingly, it should now qualify as a deferral state.

125. Prater v. Shell Oil Co., 15 Fair Empl. Prac. Cas. 1114 (W.D. Ky. 1977).

126. *See, e.g.*, Paxton v. Lanvin-Charles of the Ritz, Inc., 434 F. Supp. 612 (S.D.N.Y. 1977).

127. *Id.*; Magalotti v. Ford Motor Co., 418 F. Supp. 430 (E.D. Mich. 1976).

128. 29 U.S.C. § 626(e) (1976 & Supp. 1979).

129. 29 U.S.C. § 255 (1976).

130. 29 U.S.C. § 626(e) (1976 & Supp. 1979).

131. Marshall v. Hill Bros., 432 F. Supp. 1320 (N.D. Cal. 1977); Platt v. Burroughs Corp., 424 F. Supp. 1329 (E.D. Pa. 1976).

Here, too, practitioners face the problem of determining when the period begins and when it ends. The cases agree that the statute does not begin to run until the employee has reason to know that he has been injured. In discharge cases the statute generally begins to run on the date that the employee is discharged—that is, when he stops performing services for the employer.[132] By comparison, when the employee is challenging the provisions of a seniority system, the statute does not begin to run until the provisions are actually applied to him.[133]

The leading case on tolling the statute of limitations is *Ott v. Midland-Ross Corp.* (*Ott* II).[134] The issue in that case was whether Ott, who had filed his suit three years and seven months after he was discharged, had waited too long to file suit after learning of the company's fraudulent efforts to dissuade him from suing at all.[135] The lower court entered summary judgment in favor of the employer,[136] but the court of appeals reversed, holding that, on a motion for summary judgment, the question was not whether the employee "knew or should have known" of the employer's impending action, but whether he "would inevitably have been led . . . to the conclusion" that the employer intended to terminate his contract.[137]

The 1978 amendments added a provision for tolling the limitations period for up to one year while the federal enforcement agency attempts to secure the employer's voluntary compliance.[138] This provision should reduce the advantage that an employer can gain by dragging its heels during the conciliation process, a tactic which has presented problems in the past.

E. *The Duty to Seek Conciliation Before Bringing Suit*

The federal agency responsible for enforcing the Act, now the EEOC, may bring an action in its own name, but it must first attempt to gain voluntary compliance through informal methods.[139] Employers have had some success in using this requirement to thwart enforcement suits brought by the EEOC.[140]

The statute says that the agency "shall attempt . . . to effect voluntary compliance,"[141] but the question is how much effort the agency must put into its attempt. In an early decision construing this provision, the Eighth Circuit Court of Appeals, relying on the 1967 House Report, concluded that "the [agency] must initially use exhaustive, affirmative

132. Jackson v. Alcan Sheet & Plate, 18 Fair Empl. Prac. Cas. 113 (N.D.N.Y. 1978).

133. Morelock v. NCR Corp., 586 F.2d 1096 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979).

134. 600 F.2d 24 (6th Cir. 1979).

135. *Id.* at 26-27.

136. *Id.* at 27.

137. *Id.* at 28.

138. Pub. L. No. 95-256, § 4(c), 92 Stat. 191 (1978) (codified at 29 U.S.C. § 626(e)(2) (Supp. 1979)).

139. 29 U.S.C. § 626(b) (1976).

140. *See* cases cited in notes 141-59 *infra*.

141. 29 U.S.C. § 626(b) (1976).

action to attempt to achieve conciliation."[142] More recently, however, a district court rejected the word "exhaustive," noting that it did not appear in the statute.[143] The district court pointed out that the word was absent for a very good reason: the more pervasive the violation, the more difficult it would be for the agency to secure compliance, and the Act only required that the agency's efforts be "reasonably thorough under all the circumstances."[144]

The disagreement over the adjective used to describe the proper agency efforts has made little difference in practice; the courts seem to agree on the specific types of conduct that satisfy the agency's obligation. The agency must, at the outset of negotiations, inform the employer that it suspects a violation of the ADEA and tell the employer what must be done to comply with the Act.[145] The agency must also explain to the employer that back wages may be recovered by injured employees, that the violation may cause the agency to bring suit in federal district court, and that the employer will be given a chance to respond to the allegations before a suit is filed.[146]

Numerous cases reflect the failure of either the Department of Labor or the EEOC to satisfy this obligation. The failure to provide an opportunity for employer response has been the leading cause of judicial dissatisfaction with agency conciliation efforts. On other occasions, the agency either has refused to engage in negotiations unless the employer waived the statute of limitations[147] or has made only a cursory effort at conciliation, for example, two meetings and a telephone call or four short meetings over the course of two years.[148] In still other cases, the agency has limited the scope of its efforts to violations that occurred during a specified period of time or to discriminatory acts that affected only a limited number of employees, then filed a lawsuit challenging a broader range of practices.[149]

But in *Marshall v. Hartford Fire Insurance Co.*,[150] the most thorough discussion of agency responsibilities to date, the court upheld the agency's actions. In *Marshall* the Department of Labor had provided the em-

142. Brennan v. Ace Hardware Corp., 495 F.2d 368, 374 (8th Cir. 1974), *citing* [1967] U.S. CODE CONG. & AD. NEWS 2213, 2218.

143. Marshall v. Hartford Fire Ins. Co., 78 F.R.D. 97 (D. Conn. 1978).

144. *Id.* at 104.

145. Usery v. Sun Oil Co., 605 F.2d 1331 (5th Cir. 1979), sets out the standards for agency action.

146. *Id.*

147. Marshall v. Sun Oil Co., 592 F.2d 563 (10th Cir.) *cert. denied*, 100 S. Ct. 49 (1979); Marshall v. Newburg R-2 School Dist., 469 F. Supp. 1030 (E.D. Mo. 1979).

148. Brennan v. Ace Hardward Corp., 495 F.2d 368 (8th Cir. 1974); Marshall v. Baltimore & O. R.R. Co., 461 F. Supp. 362 (D. Md. 1978). *But see* Marshall v. American Motors Corp., 475 F. Supp. 875 (E.D. Mich. 1979).

149. Marshall v. Tecumseh Prods. Co., 19 Fair Empl. Prac. Cas. 1400 (W.D. Tenn. 1978); Usery v. Sun Oil Co., 423 F. Supp. 125 (N.D. Tex. 1976), *rev'd sub. nom.*, Marshall v. Sun Oil Co., 21 Fair Empl. Prac. Cas. 257 (5th Cir. 1979).

150. 78 F.R.D. 97 (D. Conn. 1978).

ployer with a full list of the employees allegedly affected by the employer's discriminatory conduct and an estimate of the potential liability for back pay with an explanation of how the figures had been computed.[151] The Department also identified new victims during the course of seven-day long negotiation sessions.[152] Hartford challenged the Department's efforts on three grounds: first, that the Department had refused to compute the exact amount of back pay due employees until Hartford had admitted liability; second, that the Department had failed to explain its reasoning for inferring discrimination in each individual case; and, finally, that the Department had not bargained to impasse on each charge.[153] The court rejected each of these arguments. It first ruled that the Department's estimates of back pay were sufficient for purposes of negotiation.[154] It then turned to Hartford's substantiation argument, holding that the Department was not required to furnish evidence to support each individual charge.[155] Finally, the court ruled that the statute did not require the Department to discuss each charge with the employer; it was enough that the Department stated the nature of the charge and provided the employer with an opportunity to respond to it.[156]

The courts have generally agreed that conciliatory efforts are a jurisdictional prerequisite to the maintenance of an action by a federal agency, but they reach differing results on what to do with a lawsuit when the agency fails to satisfy its obligation. At least two courts have granted summary judgment in the employer's favor on issues that the agency failed to discuss with the employer before filing suit.[157] The Eighth Circuit has adopted the position that the trial judge has discretion to stay the action pending further conciliation conferences or to dismiss the suit.[158] In more recent cases, the district courts have generally preferred to grant a stay, but the Tenth Circuit has suggested that a stay is improper if the agency has not made a substantial initial effort at informal agreement.[159]

III. JURY TRIAL AND DAMAGES

A. *Right to Trial by Jury*

In *Lorillard v. Pons*[160] the Supreme Court resolved a split in authority

151. *Id.* at 100-01.

152. *Id.* at 101-02.

153. *Id.* at 104.

154. *Id.* at 105.

155. *Id.* at 105-06.

156. *Id.* at 106-07.

157. Marshall v. Tecumseh Prods. Co., 19 Fair Empl. Prac. Cas. 1400 (W.D. Tenn. 1978); Usery v. Sun Oil Co., 423 F. Supp. 125 (N.D. Tex. 1975).

158. Brennan v. Ace Hardware Corp., 495 F.2d 368 (8th Cir. 1974).

159. Marshall v. Sun Oil Co., 592 F.2d 563 (10th Cir.), *cert. denied*, 100 S. Ct. 49 (1979). *See also* Marshall v. Newburg R-2 School Dist., 469 F. Supp. 1030 (E.D. Mo. 1979); Marshall v. Baltimore & O. R.R. Co., 461 F. Supp. 362 (D. Md. 1978).

160. 434 U.S. 575 (1978).

by holding, as a matter of statutory construction, that there is a right to trial by jury under the ADEA. The 1978 amendments specifically provide that either party may request a jury trial on all issues of fact.[161]

B. *Damages*

The damage provision of the ADEA is somewhat complicated. Basically, the Act provides that

> [a]mounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title, *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.[162]

In addition to equitable relief, this section appears to create three categories of money damages: back pay ("amounts owing"), double or "liquidated" damages for willful violations, and other legal relief "as may be appropriate." Three questions concerning the propriety of granting the latter two types of relief have troubled the courts. First, are damages for the plaintiff's pain and suffering proper? Second, can punitive damages be awarded? Finally, what constitutes a "willful" violation of the ADEA?

1. *Pain and Suffering*

The authorities are sharply divided over whether awards for pain and suffering and similar intangible damages are available under the ADEA. Four courts of appeals[163] have held that damages of this type cannot be awarded, and there are any number of district court decisions[164] on both

161. Pub. L. No. 95-256, § 4(a), 92 Stat. 190 (1978) (codified at 29 U.S.C. § 626(c)(2) (Supp. 1979)).

162. 29 U.S.C. § 626(b) (1976).

163. Slatin v. Stanford Research Institute, 590 F.2d 1292 (4th Cir. 1979); Vasquez v. Eastern Airlines, 579 F.2d 107 (1st Cir. 1978); Rogers v. Exxon Research & Eng'r Co., 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); Dean v. American Security Ins. Co., 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978).

164. The cases permitting an award for pain and suffering include: Flynn v. Morgan Guar. Trust Co., 463 F. Supp. 676 (E.D.N.Y. 1979); Morton v. Sheboygan Memorial Hospital, 458 F. Supp. 804 (E.D. Wis. 1978); Gifford v. B.D. Diagnostics, 458 F. Supp. 462 (N.D. Ohio 1978); Buchholz v. Symons Mfg. Co., 445 F. Supp. 706 (E.D. Wis. 1978); Coates v. National Cash Register Co., 433 F. Supp. 655 (W.D. Va. 1977); Combes v. Griffin Television, Inc., 421 F. Supp. 841 (W.D. Okla. 1976); Bertrand v. Orkin Exterminating Co., 419 F. Supp. 1123 (N.D. Ill. 1976).

Decisions in which district courts have refused to award pain and suffering include: Douglas v. American Cyanamid Co., 472 F. Supp. 298 (D. Conn. 1979); Jaffee v. Plough Broadcasting Co., 19 Fair Empl. Prac. Cas. 1194 (D. Md. 1979); Brin v. Bigsby and Kruthers, 19 Fair Empl. Prac. Cas. 415 (N.D. Ill. 1979); Stevenson v. J.C. Penney Co., 464 F. Supp. 94 (N.D. Ill. 1979); Riddle v. Getty Ref. & Marketing Co., 460 F. Supp. 678 (N.D. Okla. 1978); Dunwoodie v. Chrysler Corp., 459 F. Supp. 971 (E.D. Mich. 1978); Ellis v. Phillippine Airlines, 443 F. Supp. 251 (N.D. Cal. 1977); Postemski v. Pratt & Whitney Aircraft, 443 F. Supp. 101 (D. Conn. 1977); Jaeger v. American Cyanamid Co., 442 F. Supp. 1270 (E.D. Wis. 1978); Catlett v. Owens-Illinois, Inc., 19 Fair Empl. Prac. Cas. 1664 (W.D. Mo.

sides of the issue. Not infrequently, two judges within the same district will disagree on this question.

The most persuasive reason for allowing recovery of damages for pain and suffering is the language of the Act itself. It permits "legal . . . relief, including without limitation . . . enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation. . . ."[165] If Congress did intend to limit recovery to back wages only, its use of the words "without limitation" is unexplainable. Other points that favor allowing plaintiffs to recover for pain and suffering include (1) the legislative history of the Act,[166] (2) the fact that out-of-pocket losses resulting from employment discrimination are often negligible when compared to the psychological injuries caused by an employer's illegal conduct,[167] (3) the award of damages for pain and suffering promotes enforcement of the statute by providing victims with an incentive to seek redress, (4) the threat of substantial damages deters employers from violating the Act, and (5) the awards contribute to public understanding of the statute.[168]

There are also several reasons for not awarding damages for pain and suffering. First, any administrative relief is limited to an award of back pay,[169] and it would frustrate the conciliation process if employees knew that they stood to recover a substantially larger amount by bringing suit. Second, the volume of litigation would increase significantly if employees

---

1978); Seider v. Canada Dry Corp., 18 Fair Empl. Prac. Cas. 1786 (S.D.N.Y. 1978); Cavanaugh v. Texas Instruments, Inc., 440 F. Supp. 1124 (S.D. Tex. 1977); Dorsey v. Consolidated Broadcasting Corp., 432 F. Supp. 542 (E.D. Wis. 1977); Fellows v. Medford Corp., 431 F. Supp. 199 (D. Or. 1977); Looney v. Commercial Union Assurance Co., 428 F. Supp. 533 (E.D. Mich. 1977); Hannon v. Continental Nat'l Bank, 427 F. Supp. 215 (D. Col. 1977); Platt v. Burroughs Corp., 424 F. Supp. 1329 (E.D. Pa. 1976).

The courts have also held that injury to reputation is not compensable under the ADEA. Schlicke v. Allen-Bradley Co., 448 F. Supp. 252 (E.D. Wis. 1978); Dorsey v. Consolidated Broadcasting Corp., 432 F. Supp. 542 (E.D. Wis. 1977).

165. 29 U.S.C. § 626(b) (1976).

166. 113 CONG. REC. 34745 (1967) (comments of Rep. Eilburg). *See also* Note, *Damage Remedies Under the Age Discrimination in Employment Act*, 43 BROOKLYN L. REV. 47, 59 & n.47, 60 & n.51 (1976). *Cf.* Vasquez v. Eastern Airlines, 579 F.2d 107 (1st Cir. 1978) (indicating that Congress saw age discrimination only as a problem of false assumptions, and that back pay is enough to correct this problem).

167. *See* Rogers v. EXXON Research & Eng'r Corp., 404 F. Supp. 324 (D.N.J. 1975), *rev'd on other grounds*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

168. Note, *Damage Remedies Under the Age Discrimination in Employment Act*, 43 BROOKLYN L. REV. 47, 56 (1976). Experience with pain and suffering has been mixed. In Rogers v. Exxon Research & Eng'r Corp., 404 F. Supp. 324 (D.N.J. 1975), the jury awarded $750,000.00 for pain and suffering, which was reduced to $200,000.00 by the court. In Frith v. Eastern Airlines, Inc., No. C-C-76-242 (W.D.N.C. 1978), an employee who was demoted from supervisor to agent was given $50,000 by the jury for mental anguish. The court in a non-jury case, Buchholz v. Symons Mfg. Co., 445 F. Supp. 706 (E.D. Wis. 1978), awarded $7,500 for mental suffering consisting of stress in the marital relationship, pressure curtailing social acitivity and vacation plans, and loss of sleep. For some sources of evidence which can be used in age discrimination cases to support adverse physical and physiological effects of forced retirement, see the Senate Report accompanying the 1978 amendments. [1978] U.S. CODE CONG. & AD. NEWS 506-07.

169. The ADEA limits recovery to amounts that are treated as "unpaid minimum wage" and "unpaid overtime compensation." 29 U.S.C. § 626 (1976). This phraseology indicates that the sole remedy is back wages. *See, e.g.*, Slatin v. Stanford Research Inst., 590 F.2d 1292 (4th Cir. 1979).

were urged on by the prospect of large recoveries. Finally, the Conference Committee Report accompanying the 1978 amendments suggested that damages for pain and suffering could not be recovered under the Act.[170] These arguments, however, hardly support a refusal to award pain and suffering damages. The first two reasons are more the product of judicial disillusionment with pain and suffering damages than an interpretation of the Act.[171] Moreover, both arguments are highly speculative, and it is equally likely that employers, knowing that a court could not award more than back pay, would refuse to settle disputes at the administrative level. Nor is the opinion of the Conference Committee persuasive; because the 1978 amendments did not affect the portion of the Act that deals with remedies, and because the problem of interpreting these provisions had emerged long before the Committee report was drafted, the report adds nothing to the legislative history of the Act.[172]

2. *Punitive Damages*

The courts have also failed to reach a consensus on whether punitive damages can be recovered under the Act.[173] The chief reason for allowing punitive damages is that they are generally recoverable in an action based on a statute unless the statute specifically negates their availability.[174] The ADEA provides a broad range of legal remedies, and it would seem that punitive damages can be awarded.[175]

But the arguments against awarding punitive damages are more persuasive. The principal objection is the express statutory provision for liquidated damages, which may be recovered whenever the employer acted willfully.[176] Since willfulness is also the basis for awarding punitive damages,[177] a plaintiff could recover an excessive judgment if both

170. [1978] U.S. CODE CONG. & AD. NEWS 535.

171. *See* Coates v. National Cash Register Co., 433 F. Supp. 655 (W.D. Va. 1977).

172. *See* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 349 (1963).

173. Cases holding that punitive damages cannot be awarded include: Dean v. American Security Assurance Co., 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978); Rogers v. Exxon Research & Eng'r Co., 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); Stevenson v. J.C. Penney Co., 469 F. Supp. 94 (N.D. Ill. 1979); Quinn v. Bownar Publishing Co., 445 F. Supp. 780 (D. Md. 1978); Jaeger v. American Cyanamid Co., 442 F. Supp. 1270 (E.D. Wis. 1978); Riddle v. Getty Ref. & Marketing Co., 460 F. Supp. 678 (N.D. Okla. 1978); Gifford v. B.D. Diagnostics, 458 F. Supp. 462 (N.D. Ohio 1978); Hannon v. Continental Nat'l Bank, 427 F. Supp. 215 (D. Colo. 1977). To the contrary are: Walker v. Pettit Constr. Co., 437 F. Supp. 730 (D.S.C. 1977); Coates v. National Cash Register Co., 433 F. Supp. 655 (W.D. Va. 1977); Combes v. Griffin Television, Inc., 421 F. Supp. 841 (W.D. Okla. 1976); Bertrand v. Orkin Exterminating Co., 419 F. Supp. 1123 (N.D. Ill. 1976).

174. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2 (4th ed. 1971).

175. One court finds comfort in the extensive discussion of the "legal remedies" provision in Lorillard v. Pons, 434 U.S. 575 (1978), to support the conclusion that punitive damages are permitted. Kennedy v. Mountain States Tel. & Tel. Co., 449 F. Supp. 1008 (D. Colo. 1978). In support of the jury trial claim in *Lorillard*, the respondent argued that punitive damages are recoverable, but the Supreme Court declined to allude to this issue in its opinion. It is submitted that the *Kennedy* decision reads more into *Lorillard* than is warranted.

176. 29 U.S.C. § 626(b) (1976).

177. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 9-10 (4th ed. 1971).

liquidated and punitive damages are available. Congress apparently meant the liquidated damages provision to serve as a substitute for punitive damages. The legislative history suggests that liquidated damages were incorporated into the Act to deter and punish violations, and the proposed criminal penalties were deleted when the liquidated damage provision was added.[178]

3. *Willfulness as the Basis for Liquidated Damages*

The ADEA provides that liquidated damages can be awarded for willful violations.[179] Two standards have emerged for defining willfulness. Roughly half the reported cases have defined the term to mean any violation that is intentional, knowing, or voluntary, as opposed to accidental.[180] To illustrate, an employer would be guilty of a willful violation if he intended to discharge the employee, even if he did not mean to violate the Act. Under this construction, virtually every violation would be willful. Other courts have adopted a more stringent view, however, requiring proof that the employer intended to take the action and that it did so knowing that the decision was prohibited by the ADEA.[181]

An important aspect of the ADEA is that the court has no discretion to withdraw or reduce an award of liquidated damages once the trier of fact has decided that the employer acted willfully. As the Supreme Court pointed out in *Lorillard v. Pons*,[182] the ADEA does not incorporate the notion—contained in the Portal-to-Portal Act—that a court has discretion to refuse liquidated damages when it is satisfied that the employer acted in good faith.

IV. PROVING AGE DISCRIMINATION

Litigators preparing an age discrimination case for trial should heed

---

178. 113 CONG. REC. 2199, 7076 (1967) (comments of Sen. Javits). *See also* Note, *Damage Remedies Under the Age Discrimination in Employment Act*, 43 BROOKLYN L. REV. 47, 59 & n.47, 60 & n.51 (1976); Dean v. American Security Assurance Co., 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978); Gifford v. B.D. Diagnostics, 458 F. Supp. 462 (N.D. Ohio 1978).

The Conference Committee Report written in connection with the 1978 amendments takes the position that only lost wages and fringe benefits, together with the statutory liquidated damages, are recoverable under the ADEA. The report specifically states that punitive damages cannot be recovered. [1978] U.S. CODE CONG. & AD. NEWS 1007. Because the provisions of the Act relating to remedies were not affected by the 1978 amendments, and because the construction issue had emerged in the courts prior to the drafting of this report, this document should not be regarded as a competent aid to statutory construction. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 349 (1963).

179. 29 U.S.C. § 626(b) (1976).

180. Hays v. Republic Steel Corp., 531 F.2d 1307 (5th Cir. 1976); Rogers v. Exxon Research & Eng'r Co., 404 F. Supp. 324 (D.N.J. 1975), *rev'd on other grounds*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); Hodgson v. Ideal Corrugated Box Co., 8 Empl. Prac. Dec. ¶ 805 (N.D. W. Va. 1974).

181. Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979); Coates v. National Cash Register Co., 433 F. Supp. 655 (W.D. Va. 1977); Bishop v. Jelleff Assoc., 398 F. Supp. 579 (D.D.C. 1974).

182. 434 U.S. 575, 581 n.8 (1978). The First Circuit agrees. Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979). *But see* Hays v. Republic Steel Corp., 531 F.2d 1307 (5th Cir. 1976), a case that has no continued validity in light of the Supreme Court's *Lorillard* decision.

this cardinal rule: keep the elements of the prima facie case distinct from the ultimate facts to be proven at trial. The Supreme Court has recently warned that the description of a prima facie case outlined in *McDonnell Douglas Corp. v. Green*[183] cannot be given a "rigid, mechanized or ritualistic" interpretation.[184] Unfortunately, the prima facie test has fossilized in the minds of many practitioners. Too often attorneys assume that the *McDonnell Douglas* standard is the only test of age discrimination, or even worse, that it conclusively establishes a case of discrimination. Commentators, too, have turned to the elements of the prima facie case too quickly, taking what must be proved as a given and limiting their discussion to the means of proving it.[185] By postponing our discussion of the prima facie case, we hope to give a simpler explanation of the roles played by the prima facie standard, shifting evidentiary burdens, statistics, and defenses in age discrimination cases.

A. *Allegations and Responses*

1. *What the Plaintiff Must Prove*

To prevail at trial, the plaintiff-employee must ultimately prove three facts by a preponderance of the evidence.[186] First, he must show that the defendant made an employment decision that was unfavorable to him—for example, that the defendant failed to hire or promote him, denied him a raise, fired him, or refused to refer him for employment. Second, the employee must prove that the plaintiff was within the age range protected by the Act at the time the decision was made. Finally, the plaintiff must show that the real reason for the defendant's actions was the plaintiff's age.

Our choice of the term "the real reason" requires some explanation. First, use of the phrase avoids the clumsier term "discriminatory intent," which misleadingly raises the same questions that must be answered in deciding whether the defendant's conduct was willful.[187] The ADEA does not prohibit all discrimination because discrimination, technically, means to distinguish for the purpose of making a choice,[188] which is not necessarily unlawful. The Act prohibits discrimination only when the basis of the distinction is the person's age. In this context, the term "discriminatory intent" interjects false issues since it suggests that the defendant either intended to make the choice (which, barring some

183. 411 U.S. 792 (1973) (race discrimination in hiring) (Title VII).

184. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

185. *See, e.g.*, S. AGID, FAIR EMPLOYMENT LITIGATION: PROVING AND DEFENDING A TITLE VII CASE 520 (2d ed. 1979); Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380, 388 (1976). In Note, *Proving Discrimination under the Age Discrimination in Employment Act*, 17 ARIZ. L. REV. 495 (1975), the author does try to explain what the plaintiff ultimately must prove, but limits the discussion to whether the employee must show that the employer intended to violate the law.

186. *See generally*, Note, *Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380, 388-99 (1976).

187. *See* text accompanying notes 180-81 *supra*.

188. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 648 (1966).

mistake, is always true) or consciously based its choice on the plaintiff's age. The first implication is technically correct, but useless in practice since choices may be unintentional. For example, suppose an employer has failed to hire an applicant because it has lost his application. What difference does it make whether the employer's explanation is that it did not intentionally refuse to hire the applicant, because it did not know he had applied, or whether the explanation is that it did not hire him because his application was lost? An unintentional distinction, in this sense, is never one made on the basis of age. On the other hand, the second inference is not entirely accurate since the ADEA is designed to eradicate both conscious and unconscious stereotypes about the abilities of older workers.[189] The proscriptions of the Act are not limited to employers who know that age is the reason why they are treating older workers unfavorably.[190]

Our second reason for choosing the term "the real reason" is that it describes the proper standard for determining liability when the defendant has multiple reasons for making a choice. Recognizing that an employment decision may be based on a number of factors, courts have developed tests to evaluate whether the defendant's reliance on the plaintiff's age was sufficient to warrant a violation of the Act. Although similar in substance, these tests can be confusing. The most stringent requirement, from the plaintiff's point of view, is that age must be the sole motivating factor.[191] The middle position is that age must be a factor that "made a difference,"[192] while the most generous position requires only that age be "one factor in the decision," or the reason for the decision "in whole or in part."[193]

Both the generous and the stringent positions have faults. Under the generous standard the trier of fact may be forced to discredit undisputed evidence of age bias if it believes that other factors were more important. For example, in *Kentroti v. Frontier Airlines*[194] the trial court heard

189. Note, *The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act*, 88 YALE L. J. 565, 578-79 (1979) [hereinafter cited as Note, *Business Necessity and the ADEA*].

190. If the word "unconscious" troubles the reader, then "well-intended" may be more satisfactory. Regardless of the description, the Act is meant to prevent an employer from assuming that, for example, older workers are less productive than younger ones, whether or not the employer is "conscious" that this assumption might be false.

Despite our quibbles, we realize that "discriminatory intent" is probably fixed in the vocabulary of equal employment opportunity law.

191. Brennan v. Reynolds & Co., 367 F. Supp. 440 (N.D. Ill. 1973).

192. Laugesen v. Anaconda Co., 510 F. 2d 307, 310 (6th Cir. 1975); Carpenter v. Continental Trailways, 446 F. Supp. 70 (E.D. Tenn. 1978) (age must be "one of the determinative factors"); Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299 (E.D. Mich. 1976). *See also* 29 C.F.R. § 860.103(c) (1979) ("determining factor").

193. Kentroti v. Frontier Airlines, 18 Fair Empl. Prac. Cas. 364, 370 (10th Cir. 1978); Coates v. National Cash Register Co., 433 F. Supp. 655 (W.D. Va. 1977); Wilson v. Sealtest Foods, 501 F. 2d 84, 86 (5th Cir. 1974).

194. 16 Fair Empl. Prac. Cas. 1519 (D. Colo. 1976), *aff'd*, 18 Fair Empl. Prac. Cas. 364 (10th Cir. 1978).

undisputed testimony that Kentroti's supervisor denied his requests for a seniority number as a pilot, saying that Kentroti was "too old" to be a pilot. Furthermore, the company stipulated that it had a policy of hiring younger individuals as pilots when available. Nevertheless, the trial court entered judgment for the company, relying on the evidence that Kentroti was ineligible for a pilot's seniority number under the collective bargaining agreement. Here age appeared to be a factor, but the court apparently chose to disbelieve the supporting evidence to comply with the "one factor" standard. The flaw in the most stringent requirement is more obvious since, if applied, it could permit a defendant to use age as the determining factor and still escape liability, as long as the defendant could offer other reasons, however inconsequential, to support its action. Consequently, the "sole factor" test could defeat the remedial purpose of the Act and undercut its enforcement.

What the ADEA calls for is a variant of the middle position. For the purpose of applying the ADEA to the course of human events, the most useful approach to the problem of multiple factors is to assume that it is always one of two factors that influenced the employer's choice: the employee's age or reasons other than the employee's age. Even if the employer assumed that the employee was too old to perform the job adequately, it serves no purpose to grant relief when the employer would have reached the same decision without considering the employee's age. The Supreme Court adopted an analogous rule under the first amendment in *Mt. Healthy City Board of Education v. Doyle*:[195] an employee is not entitled to reinstatement, even though his constitutionally protected speech was a motivating factor in the employer's decision to discharge him, if the employer can show that he would have been discharged even if he had not spoken out.[196] Since it is unlikely that the Court would be more protective of rights under the ADEA than of rights under the first amendment, one can only conclude that age must be *the* determining factor—that is, the real reason—for the defendant's decision. In other words, an unfavorable decision is permissible unless the employer would not have made the decision but for the employee's age.[197]

2. *How the Defendant Can Respond*

The defendant may respond to the plaintiff's claim in either of two ways. First, it can deny the plaintiff's allegations by disputing that the plaintiff was protected by the Act, that it made an unfavorable decision, or that age was the real reason for the decision. Second, it may admit that age

195. 429 U.S. 274 (1977). The Court has already applied the reasoning of *Mt. Healthy* to Title VII. *See* Teamsters v. United States, 431 U.S. 324, 368 (1977).

196. The burden of persuasion shifts to the employer on this issue. 429 U.S. at 287. We use *Mt. Healthy* here solely as a test of causation. *See* Part IV (B)(1) *infra*.

197. *Cf.* Loeb v. Textron, Inc., 600 F. 2d 1003 (1st Cir. 1979) (but for defendant's "motive to discriminate" because of age). We disagree with the *Loeb* formula only if it prevents the trier of fact from basing liability on "unconscious" assumptions about age. *See* note 190 *supra*.

was the reason, but assert an affirmative defense: either that it was necessary to base the decision on age, or that it was merely observing the terms of a good faith seniority system or employee benefit plan.

B. *How the Plaintiff Proves Age Discrimination*

The facts that the defendant has treated the plaintiff unfavorably and that the plaintiff was within the age range protected by the Act are easily proven and ordinarily stipulated before the trial begins. Usually, the plaintiff's problem at trial is proving that the defendant made its decision because of the plaintiff's age. Although it can be difficult for a plaintiff to prove what a defendant was thinking in any type of suit, it can be especially hard in age discrimination suits.

> During the legislative process culminating in enactment of the ADEA, it was widely observed that in contrast to race discrimination, there is virtually no consciousness of prejudice with regard to age, except as it relates to job ability. . . . One implication of this difference is that detecting the presence of age discrimination on the job will often be difficult.[198]

Age bias may be consciously concealed or may lie hidden in the defendant's untested assumptions about older workers.

Direct proof of age discrimination is hard to come by. It is increasingly rare that a worker is told he is "too old" for a job. Rarer still is a defendant's written admission that age is the reason for an employment decision. Consequently, to bring order to a trial in which the plaintiff can offer only circumstantial evidence of the defendant's reasoning—and probably to ease the plaintiff's burden of producing such evidence—the Supreme Court has announced formulas for establishing a prima facie case of unlawful discrimination.

1. *The Prima Facie Case and Evidentiary Burdens*

"Considerable confusion has attended [judicial] opinion discussions of the prima facie case and burdens of proof under the ADEA."[199] This confusion is understandable. The Supreme Court has never discussed the order and allocation of proof under the ADEA, only under Title VII. Consequently, the lower courts have had two questions to answer: (1) how does Title VII allocate the burden of proof, and (2) given the different natures of race and age discrimination, should this allocation apply nevertheless to suits under the ADEA? The answer to the second question is that the burdens are the same under both statutes. Our answer to the first requires a closer look at the Supreme Court's decisions.

The Supreme Court first addressed the allocation of proof in a private suit alleging race discrimination in hiring in *McDonnell Douglas Corp. v. Green*.[200] The Court placed the "initial burden" of establishing a prima

198. Note, *Business Necessity and the ADEA*, *supra* note 189, at 578 n.62 (citations omitted).

199. Marshall v. Goodyear Tire & Rubber Co., 554 F. 2d 730, 735 (5th Cir. 1977).

200. 411 U.S. 792 (1973).

facie case of discrimination on the plaintiff. It did not define what "prima facie" meant, but it did provide an illustration of the elements of a prima facie case:

> (i) that he [the plaintiff] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[201]

Once the plaintiff has made this showing, the Court continued, the "burden of proof" shifts to the defendant, and the defendant must "articulate some legitimate, nondiscriminatory reason" for its action.[202] The plaintiff must then "be afforded a fair opportunity" to show that the proffered reason is merely a pretext for unlawful discrimination.[203]

The problem with *McDonnell Douglas* is its use of the term "burden of proof." As Professors James and Hazard have pointed out, "the term 'burden of proof' is used in our law to refer to two separate and quite different concepts";[204] there is the burden of production and the burden of persuasion, which are also called the burden of going forward and the risk of non-persuasion. A party with the burden of production on a given issue "must introduce sufficient evidence to justify a verdict in his favor . . . on each of the propositions of fact which he must establish as part of his case."[205] In other words, the party must produce enough evidence to avoid a directed verdict.[206] Whether a party has met the burden of production is a question of law—the court decides it.[207] The burden of persuasion, on the other hand, allocates the risk of loss when the trier of fact cannot reach a conclusion. If the trier of fact, having heard all the evidence on an issue, is uncertain which way to decide, the party with the burden of persuasion loses.[208] Whether a party has carried the burden of persuasion is a question of fact—the trier of fact decides it.[209]

In any suit, the burdens of production and persuasion are allocated by law. The plaintiff does not always bear the burden of persuasion on all issues in a case, and even when he does, the defendant may still have the

---

201. *Id.* at 802.

202. *Id.* at 802-03.

203. *Id.* at 804.

204. F. JAMES & G. HAZARD, CIVIL PROCEDURE § 7.5 (2d. ed. 1977).

205. Id. at § 7.7.

206. The standard used by the Sixth Circuit is typical. When a party moves for a directed verdict, the court must construe the evidence presented in the light most favorable to the opponent, draw all reasonable inferences from the evidence, and then determine whether it raises a question for the jury. Morelock v. National Cash Register Corp., 586 F.2d 1096 (6th Cir.), *cert. denied*, 441 U.S. 906 (1978) (on motion for judgment n.o.v.).

207. *See* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 336 (2d ed. Cleary ed. 1972).

208. The degree of uncertainty permitted depends on the standard of proof. In civil cases the standard is usually a preponderance of the evidence. Under this standard, if the evidence is in equipoise, the party with the burden of proof loses.

209. *See* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 336 (2d ed. Cleary ed. 1972).

burden of production on some issues. Indeed, "there is no satisfactory test for allocating the burden of proof in either sense or [on?] any given issue."[210] Lower courts interpreting *McDonnell Douglas* have been free to rely on policy and intuition when deciding what the Supreme Court meant. At least four courts of appeals have ruled that both the burden of production and the burden of persuasion shift to the defendant once the plaintiff has made out a prima facie case under Title VII.[211] By comparison, the courts of appeals are apparently unanimous in ruling that only the burden of production shifts under the ADEA.[212] One commentator has defended this difference in results on policy grounds.[213]

More recent Supreme Court decisions have made it clear, however, that only the burden of production shifts under Title VII. The Court continues to use the imprecise term, "burden of proof,"[214] but its intention is apparent. A Title VII plaintiff carries the burden of persuasion on "the ultimate factual issues," but during the course of the trial, the burden of producing evidence to establish or rebut those issues shifts back and forth. This was the ruling announced in *Teamsters v. United States*,[215] the most helpful statement yet on burdens of proof under Title VII. In that case the Court clearly distinguished between the plaintiff's initial burden of establishing a prima facie case and the burden of persuading the trier of fact that "there was a pattern or practice of such disparate treatment and, if so, [that] the differences were 'racially premised.' "[216] Once the plaintiff

210. F. JAMES & G. HAZARD, *supra* note 204, at § 7.8. Three common reasons for allocating the burden of proof to a party are (1) access to information (*i.e.*, the one who knows the most about a fact should bear the burden of proving that fact); (2) the general idea that the accusing party should be responsible for establishing his allegations; and (3) the notion that events normally follow a pattern and one who claims that something out of the ordinary has occurred should be responsible for proving that claim.

211. Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380, 389 n.54 (1976). The Note cites four appellate court decisions, three of which are in fact ambiguous on which burden (*i.e.*, the burden of persuasion or the burden of production) is shifted to the employer. Only Vulcan Soc'y v. Civil Service Comm'n, 490 F.2d 387, 393 (2d Cir. 1973), clearly shifts the burden of persuasion, and then only on the issue of whether facially neutral criteria are actually job-related. By comparison, the Third Circuit only shifts the burden of production. Scott v. University of Del., 601 F. 2d 76, 80 (3rd Cir.), *cert. denied*, 100 S. Ct. 148 (1979); Whack v. Peabody & Wind Eng'r Co., 595 F. 2d 190, 193 (3rd Cir. 1979); Rodriquez v. Taylor, 569 F. 2d 1231, 1239 (3rd Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).

212. Loeb v. Textron, Inc., 600 F. 2d 1003 (1st Cir. 1979); Schwager v. Sun Oil, 591 F. 2d 58 (10th Cir. 1979); Cova v. Coca-Cola Bottling Co., 574 F. 2d 958 (8th Cir. 1978) (burden of persuasion "reverts" to plaintiff, but defendant only bears the burden of production); Bittar v. Air Canada, 512 F. 2d 582, 583 (5th Cir. 1975) (per curiam); Laugesen v. Anaconda Co., 510 F. 2d 307 (6th Cir. 1975).

Some district courts have also shifted the burden of persuasion to defendants. Marshall v. Arlene Knitwear, Inc. 454 F. Supp. 715, 728-29 (E.D.N.Y. 1978); Schulz v. Hickok Mfg. Co., 358 F. Supp. 1208 (N.D. Ga. 1973). On the other hand, one court has required the plaintiff to establish a prima facie case by a preponderance of the evidence, Murnane v. American Airlines, Inc., 21 Fair Empl. Prac. Cas. 285 (D.D.C. 1979), while another has simply refused to apply *McDonnell Douglas* to an age discrimination suit. Marshall v. Hills Bros., 432 F. Supp. 1320, 1325-26 (N.D. Cal. 1977).

213. Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380, 388-99 (1976).

214. *See* Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

215. 431 U.S. 324 (1977).

216. *Id.* at 335-36.

meets its initial burden, the defendant has the "burden of rebutting the inference [of discrimination] raised by [the prima facie showing]."[217] The Court's opinion evidently shifts the burden of production on the discrete factual issue of whether race was the reason for the unfavorable treatment. This reading of *Teamsters* is buttressed by the Court's apparent ruling that the defendant's response to the prima facie case was insufficient as a matter of law.[218] Meeting the production burden, as was noted above, is a question of law. Further support is found in *Board of Trustees of Keene State College v. Sweeney*,[219] in which the Court, reversing the First Circuit's ruling that the defendant had to prove it lacked "discriminatory motive," observed that

> [w]hile words such as "articulate," "show," and "prove," may have more or less similar meanings depending upon the context in which they are used, we think that there is a significant distinction between merely "articulat[ing] some legitimate, non-discriminatory reason" and "prov[ing] absence of discriminatory motive." . . . [T]he Court of Appeals appears to have imposed a heavier burden on the employer than *Furnco* [Construction Corp. v. Waters, 438 U.S. 567 (1978),] warrants.[220]

This "significant distinction" is identical to the difference between carrying the burden of production and the burden of persuasion on this issue.

In allocating the burden of production, the Supreme Court has (perhaps unconsciously) followed the pattern of what Professors James and Hazard call the "orthodox view" of presumptions.[221] Under this view, the plaintiff must produce enough evidence to allow the trier of fact to infer the existence of the disputed fact—for example, discrimination based on race. Once the plaintiff has met this burden—that is, has made out a prima facie case—his version of the dispute is presumed to be true unless the defendant produces evidence to the contrary.[222] According to the orthodox view,[223] if the parties produce conflicting evidence, the presumption drops out of the picture and the trier of fact is free to assess all the evidence produced on the issue. The "presumption" is merely a device for shifting the burden of production. The *McDonnell Douglas* decision conforms with this view. After the defendant has articulated its legitimate reason, the burden of production does not revert to the plaintiff: the plaintiff is not required to produce evidence on the sub-issue of pretext.[224]

---

217. *Id.* at 339.

218. *Id.* at 342 n.24. In *Furnco* the Court ruled that the plaintiff had made out a prima facie case "as a matter of law." 438 U.S. 567, 575 (1978).

219. 439 U.S. 24 (1978) (per curiam).

220. *Id.* at 25.

221. F. JAMES & G. HAZARD, *supra* note 204, at § 7.9.

222. *Id.*

223. In a jury trial under the ADEA, the jury would *never* be instructed on the prima facie case or the burdens of production or persuasion.

224. The plaintiff is given an opportunity to produce evidence of pretext, but he is not required to do so. 411 U.S. at 804. Thus, the First Circuit was incorrect in suggesting that the judge should instruct

This means that a directed verdict will not be entered against the plaintiff if he fails to put on evidence to show that the employer's explanation is a pretext. The trier of fact may still disbelieve the defendant's reasons and find for the plaintiff on the basis of the prima facie showing of unlawful discrimination.

2. *Elements of the Prima Facie Case and the Use of Statistics*

Although the Supreme Court has followed the pattern of presumptions in allocating the burden of production, it has not created a formal presumption, that is, it has not prescribed a particular set of facts as the sole formula for creating a presumption or inference of discrimination. When the Court announced its *McDonnell Douglas* formula, it cautioned that the decision "is not necessarily applicable in every respect to differing factual situations."[225] The Court asks only for "evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act."[226]

In the absence of direct proof,[227] the Court has accepted two types of prima facie showings of individual acts of discrimination. The first is the *McDonnell Douglas* formula, which requires the plaintiff to "demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or [in the context of hiring or promotion] the absence of a vacancy in the job sought."[228] The second possibility is to establish that the defendant had engaged in a pattern of unlawful discrimination, from which a court can infer that a given employment decision was a part of the pattern.[229] In practice, the second formula is usually satisfied by statistical evidence combined with evidence of particular acts of discrimination,[230] but it may properly be satisfied by statistical evidence alone.

The best summary of how a plaintiff can satisfy the burden of production under the ADEA is found in *Moore v. Sears, Roebuck and*

---

the jury that the employer's evidence dispels any inference of discrimination unless the plaintiff shows pretext. *See* Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979).

225. 411 U.S. at 802, n.13.

226. 431 U.S. at 358. "A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

227. Direct proof (testimony by an observer of the fact in dispute) usually satisfies the burden of production. F. JAMES & G. HAZARD, *supra* note 204, at § 7.11. *Cf.* Teamsters, 431 U.S. at 358, n.44 (*McDonnell Douglas* formula does not require direct proof).

228. Teamsters v. United States, 431 U.S. 324, 358 n.44.

229. *Id.* at 359.

230. *See, e.g.*, Teamsters v. United States, 431 U.S. 324 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); Marshall v. Sun Oil, 21 Fair Empl. Prac. Cas. 257, 260 (5th Cir. 1979). For a discussion of sophisticated statistical methods involving single and multiple variables in employment discrimination cases, *see* E. JONES, CONDUCTING POLITICAL RESEARCH 91-135 (1971); Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof & Rebuttal*, 89 HARV. L. REV. 387 (1975).

Co.,[231] a discharge case. To make a prima facie showing under *Moore*, the plaintiff must produce evidence:

> (1) that he was a member of the protected class; (2) that he was discharged; (3) that he was qualified for the position he held; and (4) if, in addition, he (a) shows he was replaced by a person younger than himself, (b) produces direct evidence of discriminatory intent, or (c) produces statistical evidence of discriminatory conduct.[232]

But as good a summary as this is, it contains a flaw. If the plaintiff offers direct proof that age was the reason for the decision, he need not establish his qualifications as a part of his prima facie case; the plaintiff need only prove his qualifications if he relies solely upon circumstantial evidence for his prima facie showing. Only in that case, says the Court, is it necessary to strengthen the inference of unlawful motive; direct proof alone satisfies the burden of production on the issue of motive.[233]

Defendants often make two arguments in support of a motion for a directed verdict when plaintiffs rely solely on circumstantial evidence. In discharge or demotion cases, defendants argue, the plaintiff must show that his replacement was not merely younger, but was under forty years of age. So far the courts have thought little of this argument. "Accepting this [view] literally would prevent [suits challenging] even blatant and willful violations of the Act . . . as long as [the employer] had a replacement employee who was over forty."[234] The more theoretical response is that because "age is a relative rather than absolute status when taken as a basis for discrimination, it need not follow that all persons protected by the Act should be grouped together for purposes of delineating the extent of their protection."[235] Age bias may properly be inferred from proof that the replacement was younger than the plaintiff.

The second argument concerns the value of the plaintiff's statistical evidence as a basis for inferring that age was the reason for the unequal treatment. There is no general consensus on the weight to be given

---

231. 464 F. Supp. 357 (N.D. Ga. 1979).

232. *Id.* at 363.

233. To repeat our reasoning, to meet the burden of production, the plaintiff must produce sufficient evidence on each of the "ultimate facts": (1) plaintiff's age, (2) an unfavorable employment decision, and (3) age as the real reason for the decision. *See* Part IV(A) *supra*. Qualification for the job is not an "ultimate fact" under the ADEA, and direct proof that age was the reason for the employer's action should satisfy the production burden. *See* note 227 *supra*. Therefore, if plaintiff can produce direct proof, he should not suffer a directed verdict for failing to show his qualifications. His ability is not an issue until the employer raises it in defense. *Accord*, Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 736 (5th Cir. 1977). *But cf.* Marshall v. Airpax Elec., Inc., 595 F.2d 1043 (5th Cir. 1979) (per curiam) (despite evidence that company wrote "too old" on applicant's form, government failed to make prima facie case when it failed to show that applicant was qualified or that a job opening existed when she applied). For the same reason, the plaintiff need not show that he was replaced by a younger worker. Bonham v. Dresser Indus., Inc., 569 F.2d 187, 195 (3rd Cir. 1977), *cert. denied*, 439 U.S. 821 (1978). *Accord*, King v. New Hampshire Dept. of Resources, 562 F.2d 80, 83 (1st Cir. 1977) (Title VII).

234. Marshall v. Baltimore & O. R.R. Co., 461 F. Supp. 362, 364 (D. Md. 1978).

235. Moore v. Sears, Roebuck & Co., 464 F. Supp. 357, 366 (N.D. Ga. 1979). *Contra*, Price v. Maryland Cas. Co., 561 F.2d 609, 612 (5th Cir. 1977).

statistical information.[236] The Supreme Court has cautioned that, like other types of evidence, "statistics are not irrefutable; . . . their usefulness depends on all of the surrounding facts and circumstances."[237] The kinds of statistical comparisons used in practice vary greatly. In reorganization cases, in which there are many demotions or discharges, one approach has been to take the age composition of the total workforce before reorganization, then to compare the age composition of the group of discharged workers to see if a disproportionately high number of older workers were affected.[238] Another tack has been to make comparisons using the average age of employee groups—for example, the average ages of discharged versus retained employees,[239] or the average age of a segment of the workforce before and after a discharge or over the course of several years.[240] Where these comparisons have produced insubstantial differences, the courts have concluded that the statistics reveal only what could be expected in a world free of age bias: that older workers tend to be replaced by younger ones.[241] By comparison, in challenges to promotion practices, the use of statistics in reported cases is still rare. The Fifth Circuit has ruled that, in order to establish a prima facie case, the plaintiff must show both that only a small percentage of persons over forty were promoted and that the percentage of persons over forty who were available for promotion was substantially greater than the percentage of those over forty who were promoted.[242]

236. For example, in Marshall v. Hills Bros., 432 F. Supp. 1320 (N.D. Cal. 1977), summary judgment was granted for the employer, when the evidence showed that nine out of eleven fired employees were within the protected age category, eight of them were replaced by younger employees, the younger employee was always retained when there was a choice between which of two employees to fire, and one termination was pretextual and in another there was a direct reference to the employee's age. In contrast, the plaintiff prevailed in Carpenter v. Continental Trailways, 446 F. Supp. 70 (E.D. Tenn. 1978), on facts not nearly as strong.

237. Teamsters v. United States, 431 U.S. 324, 340 (1977).

238. *See, e.g.*, Marshall v. Sun Oil Co., 21 Fair Empl. Prac. Cas. 257 (5th Cir. 1979); Walker v. Pettit Constr. Co., 605 F.2d 128 (4th Cir. 1979) (base may have been only supervisors, not entire workforce; context was supervisor demotion); Moore v. Sears, Roebuck & Co., 464 F. Supp. 357 (N.D. Ga. 1979).

239. Schwager v. Sun Oil Co., 591 F.2d 58 (10th Cir. 1979) (court apparently did not consider this to be part of prima facie showing, despite 10 year difference in average age of two groups).

240. Paxton v. Lanvin-Charles of the Ritz, 19 Fair Empl. Prac. Cas. 194 (S.D.N.Y. 1978) (data base increased 60% over seven year period, showing merely that newer employees tended to be younger than the initial average); Hughes v. Black Hills Power & Light Co., 18 Fair Empl. Prac. Cas. 1365 (D.S.D.), *aff'd*, 585 F.2d 918 (8th Cir. 1978) (difference of .36 years). *But see* Mistretta v. Sandia Corp., 15 Fair Empl. Prac. Cas. 1690 (D.N.M. 1977) (prima facie case established by showing that mean age of supervisors decreased from 36.3 to 34.9 years, while mean age of nonsupervisors increased from 36.1 to 41.4 years over 10 year period); Schulz v. Hickok Mfg. Co., 358 F. Supp. 1208 (N.D. Ga. 1973) (average age of district managers decreased from 53.4 to 40.75 after series of discharges).

241. Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299 (E.D. Mich. 1976); Hughes v. Black Hills Power & Light Co., 18 Fair Empl. Prac. Cas. 1365 (D.S.D.), *aff'd*, 585 F.2d 918 (1978); Mistretta v. Sandia Corp., 15 Fair Empl. Prac. Cas. 1690 (D.N.M. 1977) (90% of new hires under 40 years of age does not establish prima facie showing).

242. Lindsey v. Southwestern Bell Tele. Co., 546 F.2d 1123 (5th Cir. 1977) (per curiam). Davis v. Califano, 21 Fair Empl. Prac. Cas. 272 (D.C. Cir. 1979), holds, first, that statistics alone may meet the production burden on the motive issue, and second, that, when preparing statistical data on promotions, the plaintiff need consider only the "minimum objective qualifications" needed for promotion, not every conceivable factor that bears on the decision to promote.

Statistics can also be a weapon for defendants. An employer may use statistics showing his workforce to be racially balanced in response to a prima facie showing of race discrimination in order to buttress his denial that race was a factor.[243] Of course, statistics can also help employers in suits under the ADEA. In *Rhoades v. The Book Press*[244] the discharged plaintiff offered testimony that management wanted to "unload some of the older help."[245] The company responded in part with statistics showing that, of the employees retained in plaintiff's department, 23% were older than plaintiff.[246]

V. DEFENSES

The ADEA contains four defenses. Two of the defenses are denials of the plaintiff's claim and may have been written into the Act merely to reassure jittery business lobbyists. It is lawful for a defendant to have treated the plaintiff unequally if "the differentiation is based on reasonable factors other than age."[247] It is also lawful for the defendant to discharge or discipline an employee if the decision to do so is based on "good cause."[248] The remaining two defenses are what lawyers traditionally label "affirmative defenses:" the defendant affirms the plaintiff's claim that age was the reason for the employment decision, but asserts that its use of the classification was justified. The ADEA recognizes two justifications for using age: first, when "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business"[249] and, second, when the defendant is observing

> the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual. . . .[250]

A. *The Burden of Persuasion*

Our discussion of the burdens of production and persuasion in Part IV tacitly assumed that the defendant was denying the claim of age bias, and we concluded that the burden of persuasion remained with the plaintiff. According to at least three courts of appeals, however, when the defendant raises an affirmative defense, the burden of persuasion shifts to

243. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 580 (1978).
244. 458 F. Supp. 674 (D. Vt. 1978).
245. *Id.* at 676.
246. *Id.*
247. 29 U.S.C. § 623(f)(1) (1976).
248. 29 U.S.C. § 623(f)(3) (1976).
249. 29 U.S.C. § 623(f)(1) (1976).
250. 29 U.S.C. § 623 (f)(2) (Supp. 1979).

the defendant.[251] The cases have not discussed a policy rationale for shifting the burden under the ADEA; the courts seem satisfied with the standard practice of shifting the burden of persuasion to the party who asserts an affirmative defense. The Eighth Circuit's reasoning is typical: "[T]he Company's admission that [the plaintiff's] removal was solely on the basis of his age presents a *per se* violation . . . of the Act. In attempting to implement the [bona fide occupational qualification] exemption . . . , the Company has the burden of proving its actions were within the scope of the exemption."[252]

B. *Substantive Issues*

1. *Age-Related Factors*

Perhaps the most difficult task that litigators must face under the Act is to separate the trinity of age discrimination: age, ability, and cost. When an older worker is discharged, the employer most frequently defends its action by pointing to the worker's relative lack of ability. The worker may either be capable, but inferior to the replacement, or incapable of handling basic responsibilities or producing enough income to justify his salary.[253] When the defendant relies on one or more purportedly objective evaluations of the plaintiff's performance, counsel must scrutinize the criteria used. Supervisors may have been asked to rate the plaintiff on such qualities as "ability" and "versatility," and they may reveal age bias if they consistently evaluate the oldest workers to be the weakest in these areas.[254] Defendants may also rely on the relative training levels of older and younger workers, but if the defendant postpones or denies training to older workers and directs only the younger workers to take the courses, the use of training to treat workers differently is unlawful.[255] Although employers may use test results as a basis for decisions, if the tests do not adequately predict job performance, they may violate the Act by favoring "test-wise" younger employees.[256]

251. Houghton v. McDonnell Douglas Corp., 553 F.2d 561 (8th Cir. 1977), *cert. denied*, 434 U.S. 966 (1978); Arritt v. Grisell, 567 F.2d 1267, 1271 (4th Cir. 1977); Laugesen v. Anaconda Co., 510 F.2d 307, 313 (6th Cir. 1975).

252. 553 F.2d at 564.

253. *Compare* Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299 (E.D. Mich. 1976); *and* Stringfellow v. Monsanto Co., 320 F. Supp. 1175 (W.D. Ark. 1970) (capable, but inferior), *with* Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979); *and* Donnelly v. Exxon Research & Eng'r Co., 12 Fair Empl. Prac. Cas. 417 (D.N.J. 1974) (worker produced less income than company paid him in salary.).

254. The inherent danger of age bias in this type of evaluation may be reduced if the employer expressly considers experience, length of service, or even age over forty as favorable qualities. *See, e.g.*, Gill v. Union Carbide Corp., 368 F. Supp. 364 (E.D. Tenn. 1973).

255. Coates v. National Cash Register Co., 433 F. Supp. 655 (W.D. Va. 1977). In reaching its decision the court noted: "[Y]ounger men were often chosen for this training over the older employees because the older men were more experienced and useful to NCR. Even when older men were chosen, their usefulness to the company frequently made it impossible to schedule them for the course." *Id.* at 658-59. In finding that the training level was directly related to the age of the employees the court may have ignored the legitimate cause of the disparity in training and relied solely on the fact of disparity. Nonetheless, there was other evidence that the company's defense of the disparity was a pretext.

256. 29 C.F.R. § 860.104 (1979).

The most pressing issue of the near future may well be the use of direct financial cost—the sum of the employee's salary and benefits—as a basis for employment decisions. In a literal sense, the use of this datum is not age discrimination since age is not the only factor that determines how much a worker is paid. But seniority or length of service is probably the most common reason why workers performing comparable tasks are paid different sums, and common sense tells us that seniority and age are closely linked.

So far, the direct cost issue has arisen only in discharge cases, as might be expected. Three approaches have been taken. The approach least favorable to older workers permits employers to use direct cost as a basis for discharge whenever it is "faced with a reduction in force."[257] A more favorable approach to older workers was developed in *Marshall v. Arlene Knitwear, Inc.*: "[W]here economic savings and expectation of longer future service are directly related to an employee's age, it is a violation of the ADEA to discharge the employee for those reasons."[258] Here the worker's higher salary was the result of raises earned over seventeen years, so the court ruled in her favor. But the decision can be limited by its facts: the employer made no showing that it had a financial need to reduce its workforce. In fact, the evidence suggested that the employer was trying to cheat the worker out of her pension. The third and final approach, like Janus, looks in both directions. *Donnelly v. Exxon Research and Engineering Co.*[259] holds, in dictum, that it would be unlawful for an employer to discharge an older worker doing satisfactory work simply because a younger, equally qualified person would do the same job for less pay.[260] But it rules that it is proper for the company to fire a worker whose productivity has declined in value to less than 75% of his salary.[261]

From a policy standpoint, it is reasonable to let a company fire a worker who is not "paying his own way." At the same time, the *Donnelly* rule allows the employer to define satisfactory work, which could lead to undesirable results. For example, suppose two workers, earning $20,000 and $40,000, are thirty- and fifty-years-old respectively. The older worker's better pay is the result of annual merit raises, merit meaning a year of successful service at the same position. If the company defines satisfactory work to mean production of 125% of salary, the two must produce, respectively, $25,000 and $50,000 per year. It is obvious who will be fired

257. Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299, 1318-19 (E.D. Mich. 1976). The *Mastie* decision is unpersuasive. The court reached the odd conclusion that, although the Act forbids "general assertions" that older workers are more expensive to employ, the employer may apply this belief to discharge an unlimited number of older workers following "individual assessments." *Id.* at 1318. The ADEA does not forbid assertions, it forbids companies from applying these assertions to their workers.

258. 454 F. Supp. 715, 728 (E.D.N.Y. 1978).

259. 12 Fair Empl. Prac. Cas. 417 (D.N.J. 1974).

260. *Id.* at 421-22.

261. *Id.* at 420.

first in a poor business year, even if both produce an equal amount. This result makes the initial dictum in *Donnelly* a hollow promise, and seems inconsistent with the ADEA's purpose of promoting "employment of older persons based on their ability rather than age."[262]

The ADEA is not silent on this problem, but it speaks only in whispers. The Act does not permit an age-based refusal to hire or an age-based decision to retire a worker, even if these actions could save the employer additional costs in its benefit plans.[263] It seems incongruous to give employers free rein to discharge workers when their direct-cost criterion can be so closely related to age. Yet it can be an equally serious burden to deny a financially-strapped company the right to lay off its more expensive workers. It will be a challenge to the courts and Congress to develop a solution that is sensitive to both of these concerns.[264]

2. *Age as a Bona Fide Occupational Qualification (BFOQ)*

When used as a BFOQ, age is almost always used as a generalization about an employee's ability, substituting for an individualized evaluation.[265] The effect of using age in this way is to deny employment opportunities to capable older workers, in order to screen out incapable workers. For example, if a city could lawfully require active-status firemen to be under sixty years of age, even a hundred certificates of good health would not help a qualified sixty-one-year-old to get the job. In a sense, BFOQ's require older workers to suffer from the risk that individual evaluations will not accurately predict capability.

Congress has decided to allow this loss of job opportunity whenever the use of age is "reasonably necessary to the normal operation of the particular business."[266] The implementation of this standard has left the courts confused and the commentators frustrated. The courts have relied on Title VII precedents with varying degrees of faithfulness,[267] and the commentators are undecided whether these precedents should be followed more closely or abandoned.[268] Disagreement has focused on theory as well

---

262. 29 U.S.C. § 621(b) (1976).

263. 29 U.S.C. § 623(f)(2) (Supp. 1979).

264. One good suggestion of how this might be done is found in Note, *Business Necessity and the ADEA*, *supra* note 189, at 587-95.

265. An employer may set a maximum hiring age if it can prove that no person can work for the company long enough for the company to recoup the investment it made in training. For example, if it takes the company at least five years to recoup its investment, and has a mandatory retirement age of 70, it could set age 65 as a hiring limit without making any assumptions about a worker's ability. Sometimes statistical averages are used to support this claim. *See, e.g.*, Murnane v. American Airlines, Inc., 21 Fair Empl. Prac. Cas. 284, 291 (D.D.C. 1979) (argument based on safety, not cost). Averages are generalizations about ability, and, although they may justify a BFOQ, attorneys must be careful not to let averages prove too much.

266. 29 U.S.C. § 623(f)(1) (1976).

267. *Compare* Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975) (relatively faithless), *with* Houghton v. McDonnell Douglas Corp., 553 F.2d 561 (8th Cir. 1977) *cert. denied*, 434 U.S. 966 (1978) (relatively faithful).

268. *Compare* Player, *Defenses Under the Age Discrimination in Employment Act:*

as practice, over policy as well as proof. The theory or policy side of the problem boils down to two questions. The first is whether any method of individual screening is as accurate as the BFOQ in detecting who is able to perform the job safely and properly. In the rare situation in which an employer can prove age to be the best predictor, it ought to be able to use it. If age is not the best method, the question becomes whether the alternative method is too expensive or risky for the particular business to accept. These questions seem to lurk behind the current judicial formula requiring the BFOQ to be reasonably necessary to the essence of the business, as well as a factual basis for believing all or substantially all of the group excluded would be unable to do the job safely or efficiently *or* that it is impractical to deal with group members individually.[269] As for the practice or proof side of the problem, there is a consensus on one point only: a BFOQ cannot be based on stereotyping, untested assumptions, hunches, or intuition; it must be supported by some empirical data.[270] But the courts have not been equally rigorous in demanding precise empirical bases for BFOQ's.[271]

CONCLUSION

At the 1979 Midwest Labor Law Conference, Ronald J. James, former Wage and Hour Administrator and now practitioner, observed that counseling clients about the ADEA is still difficult, largely because there is so little substantive case law to guide attorneys.[272] We hope this article will help practitioners foresee and avoid procedural problems, thus freeing the courts to devote their energies to the interpretation of the substantive mandates of the Act.

Misinterpretation, Misdirection, and the 1978 Amendments, 12 GA. L. REV. 747 (1978) (follow Title VII), *with* James & Alaimo, *BFOQ: An Exception Becoming the Rule*, 26 CLEVE. ST. L. REV. 1, 11 (1977) (Title VII precedents inadequate).

269. Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977); Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975). James and Alaimo disagree: "Only when substantially all of the suspect group can be proven to be incapable, *and* there is no practical way of sorting out the capable from the others, does it make sense to exclude the suspect group *as a group*." *BFOQ: An Exception Becoming the Rule*, *supra* note 268, at 6 (emphasis in original).

270. Aaron v. Davis, 414 F. Supp. 453 (E.D. Ark. 1976).

271. *See* cases and articles cited in notes 265-70 *supra*; *see also* Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976). *See generally* Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380, 400-10 (1976).

272. The Conference was held October 5 & 6, 1979, in Columbus, Ohio. Some of the proceedings are reported in 102 L.R.R.M. 143-48 (1979). A summary of Mr. James' remarks is reported *id.* at 145-46.